

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case Nos. 08-13555 (JMP); 08-01420 (JMP) (SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

- -x

United States Bankruptcy Court
One Bowling Green
New York, New York

April 28, 2010

9:33 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

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2 HEARING re Statement of the Securities Investor Protection
3 Corporation in Support of Trustee's Motion for Relief Pursuant
4 to the Sale Orders or, Alternatively, For Certain Limited
5 Relief Under Rule 60(b)

6

7 HEARING re Objection of HWA 555 Owners, LLC to the Motions of
8 Lehman Brothers Holdings Inc., James W. Giddens as Trustee for
9 Lehman Brothers Inc., and the Official Committee of Unsecured
10 Creditors of Lehman Brothers Holdings Inc. to Modify the
11 September 20, 2008 Sale Order and for Other Relief

12

13 HEARING re Statement of the Bank of New York Mellon Trust
14 Company in Support of the Motions for (I) an Order Modifying
15 the September 20, 2008 Sale Order and Granting Other Relief and
16 (II) to Unseal Motions for Relief from September 20, 2008 Sale
17 Order (and Related SIPA Sale Order)

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2 HEARING re Joint Statement And Reservation of Rights of the
3 Bank Of Tokyo-Mitsubishi UFJ, Ltd. and Lloyds TSB Bank, plc in
4 Connection with (I) Motions of Lehman Brothers Holdings, Inc.,
5 The Official Committee Of Unsecured Creditors, And James W.
6 Giddens, as Trustee For Lehman Brothers, Inc., for Certain
7 Relief Pursuant to the September 20, 2008 Sale Orders; and (II)
8 Motion of Barclays Capital Inc. to Enforce the Sale Orders and
9 Secure Delivery Of Undelivered Assets

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11 HEARING re Australia & New Zealand Banking Group LTD's Letter
12 Regarding Rule 60 Proceedings

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14 HEARING re LibertyView's: (A) Joinder to (i) the SIPA Trustee's
15 Motion, (ii) the Committee's Motion; and (iii) LBHI's Motion
16 for Relief from the Sale Orders or, Alternatively, for Certain
17 Limited Relief Under Rule 60(b); and (B) Objection to Barclays
18 Capital Inc.'s Motion to Enforce the Sale Order

19

20 HEARING re Joinder of Newport Global Opportunities to
21 LibertyView's: (A) Joinder to (i) the Trustees' Motion, (ii)
22 the Committee's Motion; and (iii) LBHI's Motion for Relief from
23 the Sale Orders or, Alternatively, for Certain Limited Relief
24 Under Rule 60(b); and (B) Objection to Barclays Capital Inc.'s
25 Motion to Enforce the Sale Order

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2 HEARING re Motion of Debtor to Modify the September 20, 2008
3 Sale Order and Granting Other Relief

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5 HEARING re Motion of the Trustee for Relief Pursuant to the
6 Sale Orders or, Alternatively, for Certain Limited Relief Under
7 Rule 60(b)

8

9 HEARING re Motion of Official Committee of Unsecured Creditors
10 of Lehman Brothers Holdings Inc., Authorizing and Approving (a)
11 Sale of Purchased Assets Free and Clear of Liens and Other
12 Interests; and (b) Assumption and Assignment of Executory
13 Contracts and Unexpired Leases, Dated September 20, 2008 (and
14 Related SIPA Sale Order) and Joinder in Debtors and SIPA
15 Trustees' Motions for an Order Under Rule 60(b) to Modify Sale
16 Order

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18 HEARING re Motion of Barclays Capital Inc. to Enforce the Sale
19 Order and Secure Delivery of All Undelivered Assets

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21 HEARING re Trustee's Adversary Complaint

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23 HEARING re LBHI's Adversary Complaint

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1 P R O C E E D I N G S

2 THE COURT: Be seated, please. Good morning. Let's
3 proceed.

4 MR. GAFFEY: Your Honor, movants call Harvey Miller.

5 THE COURT: Good morning, Mr. Miller. You find
6 yourself in an unfamiliar spot in this court this morning.

7 THE WITNESS: Good morning, Your Honor. Glad to be
8 here.

9 THE COURT: I'm going to swear you in even though I
10 know you are a member of the bard.

11 (Witness duly sworn)

12 THE COURT: Fine. Thank you. Be seated.

13 MR. GAFFEY: Thank you, Your Honor. Your Honor, as
14 before, we have a witness book. And I'd like to approach and
15 give Mr. Miller and the Court a copy.

16 THE COURT: That's fine.

17 MR. GAFFEY: I have given Mr. Schiller his copy this
18 morning.

19 THE COURT: Preempting the issue.

20 DIRECT EXAMINATION

21 BY MR. GAFFEY:

22 Q. Good morning, Mr. Miller.

23 A. Good morning.

24 Q. Mr. Miller, I'm Robert Gaffey from Jones Day, special
25 counsel to the estate in this matter. For the record, I

1 suppose, sir, you are a partner at Weil Gotshal & Manges?

2 A. I am

3 Q. And you have had a role, as I take it, in connection with
4 these bankruptcy proceedings.

5 A. I believe so.

6 Q. Could you describe for the Court what your role has been?

7 A. I was the lead -- I am the leader of the team that dealt
8 with the bankruptcy aspects of the collapse of Lehman Brothers.

9 Q. And you continue to do so in the ongoing bankruptcy
10 proceeding, sir?

11 A. I do.

12 Q. Mr. Miller, I'd like to begin by taking you back to
13 September of 2008. And I'd like you just to summarize briefly
14 what was happening the week of September 16th through September
15 22nd.

16 A. On September 15, 2008, Lehman Brothers Holdings Inc. filed
17 a Chapter 11 petition with this Court at about 2 a.m. in the
18 morning. And starting early in the morning of September 15th,
19 negotiations began with Barclays Capital in connection with a
20 potential acquisition of a North American capital markets
21 business. It was a week, I think, without any kind of
22 precedent. It was a catastrophic atmosphere. I think the only
23 words that you could use to describe it would be organized
24 chaos.

25 On September 15th, the headquarters at 745 Seventh Avenue

1 was a scene of large demoralization of the workforce, hundreds
2 of people milling about, negotiations going on. I can't
3 remember if it was the thirty-first or thirty-second floor. A
4 certain sense of a frenzy, distress. Markets were beginning to
5 plunge. There was great concern on the part of the Lehman
6 executives who were involved in the situation, Mr. McDade, Mr.
7 Russo, Mr. Berkenfeld, to some extent Mr. Fuld about what could
8 be done to preserve value. Cash was becoming an extremely
9 difficult position to ascertain. I would say it was a very
10 hectic week and it got worse as the week progressed in terms of
11 the chaos that involved. There was enormous effort on the part
12 of the team led by Mr. McDade to try and preserve value. I
13 think the first notice of a potential meeting with the Barclays
14 people was at 7 a.m. in the morning. Many of us who were
15 involved in the transaction over the weekend were just coming
16 out of the shower when e-mails began to arrive, how fast can
17 you get to 745 Seventh Avenue. I think I arrived something
18 around 9:00 in the morning. There were discussions going on at
19 that point between a team of Barclays representatives with
20 their attorneys, Cleary Gottlieb, in a large conference room.
21 As I said, it was sort of a scene of organized chaos.

22 The atmosphere was in the context of can we do something
23 to preserve value here, try and stabilize the markets. There
24 was great concern over the future of some 10,000 employees.
25 People were still streaming in and out with their personal

1 possessions. You have to remember that this was a Chapter 11
2 filing that was -- proceeded with essentially no planning
3 whatsoever.

4 The negotiations proceeded all day Monday. There were
5 lots of flash fires. People were going in and out of the room
6 as these different flash fires occurred. There were different
7 meetings going on in different places all through the floor.
8 There were many, many lawyers from Simpson Thacher, Sullivan &
9 Cromwell, Cleary Gottlieb and other lawyers. There were
10 hundreds of people floating around on that floor.

11 Those negotiations were proceeding on the basis of could
12 there be a transaction that could be effected within a very
13 short period of time. The issue was that -- and I hate to use
14 the analogy again but it was used in the courtroom -- of the
15 melting ice cube. And in the negotiations with the Barclays
16 team, it was made clear that time was of the essence as the
17 business eroding. And there was even, I would say, some
18 persuasion from the federal regulators that if you can do a
19 deal, get a deal done, the markets were getting worse. And the
20 big issue, from my perspective during Monday, was could you get
21 a deal done within the time constraints which were laid out by
22 Barclays. The feel was if you did not accomplish this
23 transaction within a very constricted time period, there would
24 be no assets to preserve, no business to be preserved.

25 So my little aspect of it was how could we do this. And

1 it was complicated by the fact that the business that was being
2 sold was essentially the business of Lehman Brothers Inc.
3 Lehman Brothers Inc. was a registered broker-deal. It did not
4 qualify for Chapter 11. It could not be a debtor under Chapter
5 11. And we were trying to structure a transaction in which
6 there would be, in effect, a joint sale of the assets of LBI,
7 Lehman Brothers Inc. And late in the afternoon, or sometime in
8 the afternoon, we talked about and I suggested that what we
9 ought to be doing is communicating with the Securities Investor
10 Protection Corporation and trying to work out an arrangement
11 where the Securities Investor Protection Corporation would
12 cooperate, would arrange for the filing of a proceeding under
13 the Securities Investor Protection Act, essentially select a
14 nominated trustee that Monday or Tuesday, I can't remember.
15 The times sort of merged into each other -- and try and keep
16 SIPC up to date on what was happening.

17 When I came up with the idea, there were Securities and
18 Exchange Commission attorneys on premises. I went down to talk
19 with them. Their initial reaction was that it could not be
20 done, that the Securities Investor Protection Corporation would
21 not go along with it. It was not exactly consistent with their
22 statutory obligations. And we had a -- I would call it
23 somewhat of a debate with the SEC. And finally, I said, why
24 don't we just call the president of the Securities Investor
25 Protection Corporation, Mr. Harback, who I knew from being a

1 SIPC trustee a number of times. And we got Steve Harback on
2 the phone. I explained to Mr. Harback my idea of a coordinated
3 Chapter 11 and a SIPA proceeding. And after -- it was twenty
4 minutes or a half hour on the phone, he said I'd buy into it.
5 I think it's a good idea and we should proceed on that basis.
6 And then the question was how fast can this transaction be
7 accomplished. The Barclays team was very anxious that the
8 transaction be completed before the end of Friday, September
9 19, I guess it was. And the Barclays team also was very
10 adamant that it would have to be a judicial sale. Barclays
11 didn't have any desire to be involved in a transaction which
12 would ultimately or possibly lead to a post-transaction claim
13 that it was a fraudulent transfer or a fraudulent conveyance.
14 So it had to be a judicial sale with a provision that it was
15 free and clear in accordance with Section 363(f) of the
16 Bankruptcy Code.

17 Once we decided on a structure, then the question was
18 getting appropriate papers to arrange for a sale. Hopefully
19 the Court would understand the exigencies of the situation, the
20 chaos that was prevailing and that this was a very unusual
21 transaction. This was not a normal merger, acquisition or
22 purchase and sale. Essentially, this was a distressed sale to
23 try and preserve value, to try to preserve employment
24 opportunities and to try to have a somewhat beneficial or
25 quieting effect on the marketplace.

1 So starting sometime Monday night into Tuesday morning, as
2 people were negotiating the asset purchase agreement, efforts
3 were being made to prepare appropriate papers so that we could
4 get sale procedures approved by the bankruptcy court, set a
5 date for approval of a sale transaction coordinating with the
6 Securities Investor Protection Corporation and having all those
7 things going on contemporaneously. So there were different
8 work streams going on in connection with this transaction.
9 That was very demanding.

10 Tuesday morning, is my recollection, there was a draft or
11 a proposed asset purchase agreement which would form the basis
12 for the motion which was made to approve the sale procedures.
13 At the same time, cash was becoming an extraordinarily short
14 item. And there were negotiations carried on with Barclays to
15 do debtor-in-possession financing under Section 364 of the
16 Bankruptcy Code. My recollection that was something like --
17 something in the area of 2 to 400 million dollars of DIP
18 financing.

19 So a motion had to be prepared to have that financing
20 approved. The motion for approval of the sales procedures was
21 filed, I think, late Tuesday afternoon. The Court was very
22 responsive to our request for acceleration. And a hearing was
23 set on Wednesday afternoon to the approval of sale procedures.
24 Notice was given -- as much notice as possible was given,
25 electronically and otherwise, very shortly after the motion was

1 filed, objections being had to come in in great volume,
2 electronically and otherwise.

3 There was a hearing on Wednesday which was the 17th of
4 September. A creditors' committee was appointed. The Office
5 of the United States Trustee recognized that this was a very
6 unusual case, that it had to move quickly. And on Tuesday
7 morning, one day after the filing, the Office of the United
8 States Trustee had an organizational meeting and appointed a
9 creditors' committee. Wednesday -- I think it was Wednesday
10 morning, the creditors' committee selected counsel, Milbank
11 Tweed. On the way down to the courthouse, I remember getting a
12 call from an attorney at Milbank Tweed, Luke Despins, who
13 advised me that he had just been appointed -- or his firm had
14 just been appointed as counsel for the creditors' committee and
15 that they have just started to review the motion for the
16 approval of the sales procedures and that they intended to ask
17 for an adjournment and wanted us to consent to it. And I told
18 Luc that there was no way that we could consent to it. Time
19 was running against us. The markets were continuing to plunge.
20 What I had predicted in terms of what would happen because of
21 the Lehman bankruptcy that past Sunday at the Federal Reserve
22 Bank were coming to fruition. I had used the word Armageddon
23 and Armageddon was beginning and was in place.

24 I told Mr. Despins I would meet him at the courthouse if
25 he wanted to discuss it. We met outside in the corridor here.

1 I tried to explain to him the urgency of the situation and he
2 suggested we ask a judge for a chambers conference. Judge Peck
3 accommodated us and met with us and we both explained our
4 positions. Judge Peck said if you want to object, you should
5 put it on the record. We're going to go into the courtroom and
6 I will hear the motion and if the committee feels it should
7 object, at least that's my recollection, it should object.

8 I think the hearing -- I can't remember if the hearing
9 started 2:00, 4:00, someplace in the afternoon. It was a long
10 hearing. There were a large number of objectors who were
11 heard. I explained the need for speed and that it was
12 important that a sale procedures be put into place and that
13 asked the Court for a hearing on Friday the 19th. After
14 hearing the objections, the Court did say that I'm going to
15 allow this to go to a sale hearing. I think the record speaks
16 for itself. And that hearing was a hearing that went on, I
17 think, until after 8:00 at night. And a hearing was set for
18 Friday afternoon to approve the sale transaction.

19 And in light of the time that was involved, the Court said
20 that it would accept objections right up to the beginning of
21 the hearing and that objections could be oral, could be
22 written, could be electronic. And the objections began to flow
23 through. It was made very clear that this was an extraordinary
24 case. And on Wednesday, the 17th, at the time of the hearing,
25 the market was beginning to cease up. Commercial Paper market

1 was drying up. The crisis was getting extremely worse than we
2 had anticipated. Credit -- there was a crisis of confidence.
3 Credit markets dried up. We were on the edge of a financial
4 collapse of the dimensions which I don't think anybody could
5 have imagined, probably much more severe than the crisis of the
6 so-called Great Depression.

7 During the course of the hearing on sale procedures, I
8 think that I explained to the Court that this was a moving
9 target, that it was a very fluid situation. It was changing
10 every hour, every minute. Values were plummeting and were
11 continuing to plummeting (sic) and nobody was able to project
12 when it would hit bottom.

13 I can't recall but I think maybe the DIP arrangement --
14 DIP financing was approved on that Wednesday. And my
15 recollection is that Lehman drew down 200 million dollars
16 immediately of the term loan. We went back to Lehman. We
17 explained what happened. The negotiations were continuing.
18 There were changes being made to the asset purchase agreement.
19 The parties that were negotiating the terms were continuing to
20 negotiate. Those negotiations continued through Thursday the
21 18th. There were, as I said different work streams. I was
22 part of the work stream that was preparing for the hearing on
23 the 19th. I spent most of Thursday afternoon into the late
24 evening hours with Mr. McDade and Mr. Ridings -- Barry Ridings
25 of Lazard Freres. Mr. McDade, because he was going to be the

1 witness in support of the transaction; and Mr. Ridings as the
2 financial advisor to the company.

3 I decided because of the situation at Lehman Brothers that
4 we would never get done with the preparation because of
5 everything that was going on at 745 Seventh Avenue. And I made
6 Mr. McDade come with me back to the Weil Gotshal offices where
7 we could have some quiet and prepare his testimony as well as
8 Mr. Ridings' testimony. So I personally was with Mr. McDade
9 and Mr. Ridings right through the evening into the early
10 morning hours of that day.

11 Then on Friday the 19th, we continued to prepare for the
12 hearing. Negotiations were still continuing among the parties.
13 There was an amended asset purchase agreement and there were
14 ongoing negotiations about preparing a clarification letter.
15 My recollection is that we asked the Court to push back the
16 hearing an hour which the Court accommodated us. We got down
17 to the Court -- I came down with one team while the
18 negotiations were continuing back at 745 Seventh Avenue in
19 respect of the clarification letter. The courtroom was packed
20 and I had great difficulty getting into the courtroom. I had
21 to get the clerk of the court to open a path for me to get into
22 the courtroom. And the hearing was about to start, I think,
23 maybe about 4:00.

24 And what happened -- there was an overflow into, I think,
25 two more courtrooms. Just about at the time the hearing was

1 going to start, my partner, Lori Fife, came down. She came
2 directly from 745 Seventh Avenue from the negotiations about
3 the clarification letter. And we asked the Court if we could
4 take some time before the actual beginning of the hearing to
5 explain to the people who were attending what the status of the
6 clarification letter was and what it was clarifying. And my
7 recollection is that took thirty, forty minutes. There were --
8 maybe an hour. And we took questions from the audience and
9 there were a large number of questions which we tried to
10 answer. And after maybe close to an hour, it was getting late
11 in the afternoon and we began the hearing.

12 The hearing went from, my guess, 4:00 to midnight of that
13 day or slightly after midnight. Mr. McDade was a witness. Mr.
14 Ridings was a witness. As I said, the objections were coming
15 in in volume. Blackberries were wearing out as the objections
16 kept pouring in. There were a large number of people; I can't
17 tell you the exact amount -- people who stood up and objected.
18 Mr. McDade was cross-examined by a number of people. Mr.
19 Ridings was cross-examined by a number of people. The sale,
20 the transaction, was supported by Federal Reserve Bank of New
21 York, the SEC, U.S. Treasury, SIPC. I should add that in
22 accordance with the arrangements which we had made with SIPC
23 early in the day in the morning, SIPC started a SIPA proceeding
24 against Lehman Brothers Inc. Lehman Brothers Inc. consented to
25 it. James Giddens, a partner at Hughes Hubbard & Reed was

1 appointed as the trustee. The SIPA case was referred to Judge
2 Peck and the sale hearing was a joint hearing in which the
3 trustee and SIPC joined and, as I said, the federal regulators
4 and governmental agencies vigorously supported the transaction.
5 And I think all the way through the 19th, we explained that
6 this was a moving transaction and tried to emphasize to the
7 Court that it wasn't the normal M&A transaction and that not
8 every i was dotted and not every t was dotted (sic). But what
9 we were trying to do is prevent loss of value and, very
10 importantly, preservation of jobs. The agreement contemplated
11 that the approximately 10,000 employees at Lehman would become
12 employees at Barclays. They would have essentially a ninety-
13 day employment period during which Barclays would make its
14 determination as to which employees it was going to keep and
15 which employees would be terminated.

16 So that after this extensive hearing which went through
17 exactly what happened during the week of the 16th, as you're
18 aware, Mr. Gaffey, the Court -- and I think it must have been
19 12:01 or something like that -- announced that it would approve
20 the transaction. And I don't want to par -- I hate to
21 paraphrase Judge Peck 'cause I always get into trouble, but
22 Judge Peck approved the transaction and he basically said he
23 approved the transaction because he didn't see any other
24 realistic alternative. And his concern about the employees
25 and, in light of the testimony of Mr. McDade that if this

1 transaction were not approved, it would be a cataclysmic
2 catastrophe. There would be no business to operate on Monday
3 morning. And the likelihood of Lehman opening up on Monday
4 morning was virtually nil.

5 And in addition to that, there were a whole host of other
6 problems which kept popping up as we went forward. On
7 Wednesday, the CME had closed out Lehman at a loss of a billion
8 eight or thereabout. At the hearing on the 19th, Hal Novikoff,
9 an attorney from the Wachtell firm, announced that there were
10 serious problems at JPMorgan Chase in connection with the
11 transaction and whether JPMorgan Chase would continue to clear
12 transactions. The following Monday, which was a dispute
13 basically between JPMorgan Chase and Barclays, we assumed that
14 that would be taken care of. Unfortunately, we found out on
15 Sunday the 21st that that had not been cleared. And there was
16 a major dispute which could have derailed the transaction.
17 That again brought into play the federal authorities who
18 exercised their influence during the closing. This is post-
19 September 19th after Judge Peck signed the order approving the
20 sale. And I might add that after Judge Peck made his oral
21 bench ruling, he did say that he was willing to stay around for
22 another hour or so in order for people to refine the sale
23 approval order. And he did. And I think it took another hour,
24 hour and a half as everybody sat around these tables and
25 reviewed the sale order. There were some changes made to it

1 and I think it must have been between 1 a.m. and 2 a.m. that
2 Judge Peck signed the sale order.

3 The closing was scheduled to begin early Saturday morning.
4 We had hoped that it might -- I think -- I remember vaguely the
5 time of 10:45 p.m. If the sale had been approved before that,
6 it was a possibility of closing it Friday night. Obviously, we
7 didn't make that. The sale closing began early Saturday
8 morning and went on from that time to just before the opening
9 of the markets on Monday, September 22nd. I think we made it
10 just about two minutes before the market opened.

11 It was a very, very difficult closing. There were lots of
12 problems in the closing. And at something around 6 a.m., it
13 looked like it was going to close. So my characterization of
14 organized chaos continued over the weekend, I think, without
15 the input and influence of the Federal Reserve Bank. The
16 Treasury -- there was a real possibility it might not have
17 closed. I can describe the closing if you would like.

18 Q. Why don't I give you a break, Mr. Miller?

19 A. Okay.

20 Q. And why don't I also give you a bottle of water. I'm
21 sure --

22 A. No. I'm fine.

23 MR. GAFFEY: May I approach, Your Honor?

24 THE WITNESS: Thank you.

25 THE COURT: Sure.

1 (Pause)

2 Q. Thank you for that, Mr. Miller. I want to follow up,
3 obviously, on a couple of things that you said. Can you give
4 the Court an idea -- I take it in this organized chaos, there
5 were a lot of lawyers from Weil Gotshal who needed to be
6 involved. Could you give the --

7 A. There were a lot of lawyers from every law firm.

8 Q. I -- on the Weil Gotshal side of things --

9 A. There were a lot of lawyers.

10 Q. Approximately how many people on the team?

11 A. Very hard for me to count. There were people from
12 corporate, people from the business finance and restructuring.
13 Ten to fifteen maybe.

14 Q. And you referred to the parties negotiating the agreement.
15 What role, if any, did you or the other Weil Gotshal lawyers
16 have in the negotiation of the economic terms of the asset
17 purchase agreement?

18 A. Practically none.

19 Q. And who, to your knowledge, sir, was involved in the
20 negotiation of the economic terms of the agreement?

21 A. Mr. McDade and his team.

22 Q. And when did the Weil Gotshal team that an agreement in
23 principle had been reached?

24 A. I can't give you a precise time. There was a negotiation
25 going on. I was in the room some of the time. Kept getting

1 called out for these flash fires. Tom Roberts, my partner in
2 the corporate department, was there most of the time. Michael
3 Lubowitz was in the room most of the time. Lori Fife was in
4 and out of the room. We were not negotiating the economic
5 terms. We were there answering legal issues.

6 Q. And what role, if any, did Weil Gotshal play in assessing
7 the values of the assets that were to be transferred from
8 Lehman to Barclays?

9 A. We didn't pay any role. I don't think we are qualified to
10 assess values.

11 Q. So I take it Weil Gotshal was not asked to conduct any
12 independent assessment of the values --

13 A. No.

14 Q. -- with respect to the assets being transferred?

15 A. No, we were not.

16 Q. And to your knowledge, sir, during the negotiations, was
17 there any discussion concerning a negotiated amount for
18 compensation, liabilities that Barclays would assume as part of
19 the transaction?

20 A. Not initially. Not during Monday when I was in the room.
21 I think that occurred later on in the process when --

22 Q. The general structure of the deal, sir, involved a
23 transfer of assets to Barclays and the consideration included
24 cash and the assumption of some liabilities, correct? That's
25 away from the real estate.

1 A. The transaction, as I understood it, was the purchase of
2 the North American capital markets business which was,
3 essentially, the business of Lehman Brothers Inc. It was a
4 transfer and an assumption of liabilities. Initially, I think
5 there was supposed to be 700 million dollars of cash that was
6 going to move with the transaction. That 700 million dollars
7 was eliminated. In the hearing on Wednesday the 17th, there
8 was a -- let me call it an accusation that eight billion
9 dollars of funds belonging to Lehman Brothers Europe had been
10 taken on the eve of the filing by Lehman Brothers Holdings Inc.
11 It was a story, I think, in the Financial Times or someplace.
12 And during the course of the hearing on Wednesday, people
13 raised the issue of this so-called grab of the eight billion
14 dollars which came up again on the 19th. The transaction
15 changed and the deal that was proposed for approval did not
16 include the transfer of cash, free cash.

17 Q. With regard to the noncash assets to be transferred, do
18 you know if estimates were made of the value of the securities
19 portion of the assets to be transferred?

20 A. There was a lot of discussion. Values were changing all
21 the time.

22 Q. And who made those estimates to assess those values?

23 A. The Lehman team.

24 Q. And did Weil Gotshal have any role during the week in
25 addressing estimates value or valuation of assets?

1 A. We're not valuation experts. This was left to the
2 businesspeople.

3 Q. Now, sir, prior to the -- well, after an agreement in
4 principle was reached overnight from the 15th to the 16th, did
5 it come to your attention that there was a meeting of the
6 Lehman board?

7 A. Did it come -- at that time?

8 Q. Yes, sir.

9 A. I knew there was going to be a board meeting at some time.
10 I don't recall specifically being told the meeting was -- are
11 you suggesting Tuesday?

12 Q. The time is not relevant to my question, sir.

13 A. No. I knew there would be a meeting of the board, yes.

14 Q. And did members of Weil Gotshal attend the board meeting
15 as far as you know?

16 A. I believe that Tom Roberts and Lori Fife attended. All or
17 part of the meeting, I can't tell you.

18 Q. Did you attend, sir?

19 A. I did not.

20 Q. And did you learn at any point what the board had
21 authorized with respect to a transaction?

22 A. All that I was told was the board had approved the
23 transaction.

24 Q. Did you learn at any time what description was given to
25 the board about the transaction it was asked to authorize?

1 A. I'm not quite sure I understand what you mean, what
2 description was given to the board.

3 Q. Did anybody tell you what the board was told about the
4 transaction?

5 A. No. I was told the board approved the transaction and I
6 needed that knowledge in connection with preparing for the
7 court hearing.

8 Q. And why did you need that knowledge to prepare for the
9 court hearing?

10 A. Because this was a major transaction. And generally, in
11 corporate law, you need a board of directors to approve a sale
12 of assets of this size.

13 Q. In the binder before you, Mr. Miller, is what's in
14 evidence as Exhibit M-2. If you could turn to that tab in your
15 book.

16 A. Yes.

17 Q. And you'll see, sir, that M-2 is a financial schedule.

18 A. Is a what?

19 Q. A financial schedule. Are we on the same document, sir?

20 A. A schedule? I don't think it's a schedule.

21 Q. It's the document up on the screen. Are we in the same
22 tab, sir?

23 A. Yes. It has two columns, "Assets" and "Liabilities".

24 Q. We could call it whatever you like, sir. Balance sheet?

25 A. You could call it a balance sheet.

1 Q. Okay. Taking a look at the balance sheet that's marked as
2 Movants' Trial Exhibit 2 --

3 A. Yes.

4 Q. -- did this balance sheet come to the attention of you or
5 your team members at Weil Gotshal at around the time that the
6 asset purchase agreement was being negotiated?

7 A. I can only speak for myself.

8 Q. Sure.

9 A. There were a number of balance sheets -- or I wouldn't
10 call them balance sheets. People were sitting at PCs making
11 various assumptions. You have to understand that the system
12 wasn't exactly working when LBIE, the English entity went into
13 administration in the United Kingdom. It basically closed down
14 the system. So getting information was very difficult.

15 Also, in the context of the chaos that prevailed, getting
16 information was very difficult. So my recollection is seeing
17 people sitting around the table with PCs making assumptions and
18 spitting out paper.

19 I wouldn't call this a balance sheet. I mean, there's so
20 many zeros on it that I'm not sure what it reflects.

21 Q. Have you seen the document before?

22 A. I did see the document before.

23 Q. When did you first see it?

24 A. I don't have a specific recollection. I would say
25 probably on Tuesday or Wednesday.

1 Q. Okay. And did you see it in connection with your work
2 regarding the asset purchase agreement?

3 A. I'm sorry?

4 Q. What was the context in which you saw it?

5 A. Probably in connection with the preparation for the
6 hearings.

7 Q. Okay. And who provided you with the document?

8 A. I think it came internally through somebody at Weil.

9 Q. Okay. And in preparing Mr. McDade for his testimony at
10 the sale hearing, did you review the document with him?

11 A. No.

12 Q. In discussions with your colleagues at Weil Gotshal or
13 with the Lehman businesspeople involved in the drafting of the
14 asset purchase agreement, did you have any discussions with
15 them about the document?

16 A. No. By Wednesday of that week, the value of the assets
17 had deteriorated so substantially that this document was
18 virtually useless.

19 Q. Was there a discussion about that document?

20 A. There was a discussion about the deterioration in the
21 values.

22 Q. Was the discussion related to the document marked as
23 Exhibit M-2?

24 A. No.

25 Q. And did Weil Gotshal have any role in preparing the

1 document marked as Exhibit M-2?

2 A. I don't believe so. I'd be shocked if they did.

3 Q. Now, I direct your attention, Mr. Miller, to the figures
4 in the lower right-hand corner on the "Liabilities" side.

5 A. Yes.

6 Q. -- for "Comp and Cure". Do you know the basis for those
7 numbers?

8 A. Well, the cure amount, which I think changed -- I don't
9 recall. The cure amount was an estimate of the potential
10 exposure in connection with the transaction. Under the terms
11 of the transaction, there was an opportunity for Barclays to
12 take assignments of executory contracts and perhaps leases.
13 Obviously, in the short time frame, there had been no
14 determination as to what executory contracts or what leases
15 would be assumed. And a figure was derived as to the potential
16 exposure. This was a contingent figure. If they assumed -- I
17 mean, if all those contracts were assumed by the debtor-in-
18 possession and then assigned to Barclays, these -- this amount
19 might be the cure amount.

20 In connection with the compensation, that also was an
21 estimate as to the possible exposure for Lehman employees going
22 over to Barclays who would either be terminated or were
23 entitled to bonuses. So it was supposed to cover both
24 severance pay and bonuses.

25 And as I said before, it was an estimate. I don't

1 remember -- I don't recall -- I don't think I ever knew who
2 really made the estimate.

3 Q. Do you know -- did you ever speak to Martin Kelly about
4 those estimates?

5 A. I have never spoken to Martin Kelly. I don't believe I've
6 ever spoken to him up through today.

7 Q. Have you ever spoken to Paolo Tonucci about those
8 estimates?

9 A. Oh, yes. Not this.

10 Q. About these numbers?

11 A. Not about these numbers, no.

12 Q. And I take it from your answer, sir, you don't have
13 knowledge as to how these figures were derived, how they were
14 calculated.

15 A. They were calculated on the basis of somebody at Lehman
16 reviewing the executory contracts and leases and coming up with
17 the estimate. On the compensation, I think they looked at the
18 compensation records for 2007.

19 Q. In the course of dealing with the Barclays side of the
20 table on the negotiations, do you know, sir, if any Lehman
21 personnel or representatives of Lehman personnel inquired of
22 Barclays as to what it planned to pay in terms of comp and cure
23 after the transaction?

24 A. I think that's covered by the asset purchase agreement.

25 Q. I'm sorry, sir. I didn't hear your answer.

1 A. I believe their obligation is set forth in the asset
2 purchase agreement.

3 Q. The question goes to whether there were any discussions
4 during the week, any discussions in the negotiations --

5 A. I'm not aware.

6 Q. -- about what Barclays planned to do.

7 A. I'm not -- I don't think -- maybe I'm misunderstanding
8 you. I'm trying to understand what do you mean by what they
9 planned.

10 Q. Well, did you see any figures that Barclays generated as
11 to what they thought their cure obligation would be?

12 A. No, sir.

13 Q. Did you see any figures as to what Barclays thought it
14 would wind up paying in the compensation element?

15 A. What Barclays thought?

16 Q. Yes, sir.

17 A. I wasn't privy to Barclays' thinking.

18 Q. I want to get a sense of in the process of reaching the
19 asset purchase agreement that was part of the information
20 shared or if Barclays kept that to itself.

21 A. Not that I was involved with.

22 Q. Okay. To your knowledge, was anybody at Weil Gotshal made
23 privy to Barclays' calculations of what it ultimately planned
24 to pay on those items?

25 A. I can't answer that question precisely but I don't think

1 so.

2 Q. Now, on the "Assets" side of the schedule, sir --

3 A. Yes.

4 Q. -- do you know if there were discussions between the
5 Lehman side of the table and the Barclays side of the table
6 toward calculating those figures on the "Assets" side of
7 Movants' Exhibit 2?

8 A. I can't answer that question in the context of this
9 exhibit. There were continuing discussions between Barclays
10 and Lehman as to values. As I said, the market was plunging.

11 Q. And you were not privy to those discussions about the
12 asset values between Lehman and Barclays?

13 A. I was in conference rooms where I heard discussions. I
14 heard discussions about -- or arguments about the marks that
15 Lehman had marked too aggressively, that the values were
16 declining so rapidly that there were questions about the value
17 of the deal.

18 Q. And in those discussions, did you hear references to
19 Lehman's book value?

20 A. I don't recall that.

21 Q. But I'm trying to get a sense of the terminology. You
22 used the word "marks". Is that the term -- is that the --

23 A. There was a lot of conversation about mark-to-market.

24 Q. Okay.

25 A. And since Lehman was a mark-to-market company, I assume

1 that book value would equate to the market value.

2 Q. And was there ever a time, sir, where you or members of
3 the Weil Gotshal team were privy to any discussion about
4 marking down Lehman's books to reflect agreed values?

5 A. Not as a participant. But being in a room which went on
6 for hours and hours and hours between the Barclay team and the
7 Lehman team with huge computer runs going CUSIP number by CUSIP
8 number to try to get to what the market value was.

9 Q. And apart from that discussion about what the market --
10 what the various views were of market value, the question is
11 whether you or anyone at Weil Gotshal were privy to a
12 discussion about marking down Lehman's books, changing Lehman's
13 marks, to reflect negotiated values.

14 A. It was clear just sitting in the conference room that that
15 was happening.

16 Q. The marking down of Lehman's books?

17 A. Not -- I can't say the marking down of Lehman's books but
18 arguments as to what the market value of the particular
19 security was.

20 Q. And once some sort of collaborative view was reached about
21 the value of the marks, did you or anyone at Weil Gotshal --
22 were you or anyone at Weil Gotshal privy to any discussions
23 about marking down Lehman's books and records to reflect that
24 negotiated value?

25 A. No, sir.

1 Q. Were you or anyone at Weil Gotshal privy to any
2 discussions concerning giving Barclays a discount from Lehman's
3 marks, from Lehman's book value?

4 A. No, sir.

5 Q. On the exhibit, sir, in the upper right-hand corner,
6 you'll see an annotation "91608" and "SB". Do you know the
7 source of those handwritten annotations?

8 A. I believe that must be Steve Berkenfeld.

9 Q. Okay. And what's your basis to believe it's Steve
10 Berkenfeld.

11 A. He told me so.

12 Q. Okay. Recently or at the time?

13 A. Oh, he told me yesterday and he told me before that.

14 Q. Okay. Did he tell you at or around the time of the
15 transaction that he had signed the --

16 MR. GAFFEY: Withdrawn, sir.

17 Q. At or around the time of the transaction, did he tell you
18 that he had put his initials on a sheet like this?

19 A. No, sir.

20 Q. Okay. If you would turn in your binder, Mr. Miller, to
21 tab M-1, you'll find a copy of the asset purchase agreement.
22 I'd ask you to turn to that.

23 A. Yes.

24 Q. And you've described for us somewhat the drafting process.
25 Who was involved -- who was involved in the actual drafting of

1 this piece of paper, this agreement?

2 A. From which side?

3 Q. Well, let's start with the Lehman side.

4 A. Probably Tom Roberts, Mike Lubowitz.

5 Q. Anyone else?

6 A. I'm sure there were associates assigned to it, but I
7 couldn't tell you who they were.

8 Q. With the number of them I have here, I'm not going to say
9 they don't matter, sir. But I'm looking more for the more
10 senior people. The Tom Roberts --

11 A. Roberts and Lubowitz.

12 Q. Okay. Thanks. And on the Barclays side, who was involved
13 in the drafting?

14 A. Victor Lewkow -- they were a whole team. I don't remember
15 the names of -- a lot of people from Cleary Gottlieb.

16 Q. And were you yourself involved in the process of
17 negotiating and drafting the terms of the asset purchase
18 agreement?

19 A. No, sir.

20 Q. I take it you were occupied with the DIP financing and
21 prepping Mr. McDade and getting ready for the hearing and
22 putting out flash fires and --

23 A. That's correct.

24 Q. -- everything else. Okay. Now, if I could direct your
25 attention, Mr. Miller, to page 6 of the asset purchase

1 agreement. And you'll see there, once you get to page 6, sir,
2 you'll see there's a definition of "purchased assets". Are you
3 with me in the document?

4 A. Yes.

5 Q. Okay. And within the definition of "purchased assets" in
6 subsection (d), there's a reference to government securities,
7 Commercial Paper, et cetera. Are you there?

8 A. Yes.

9 Q. Okay. And in that definition of "purchased assets", it
10 describes those various types of securities "with a book value
11 as of the date hereof of approximately seventy billion dollars,
12 collectively, long positions".

13 A. Yes.

14 Q. Do you know who was the proponent or who required the term
15 "book value" in that portion of the asset purchase agreement,
16 sir?

17 A. No, I do not.

18 Q. Do you know if there was any discussion between the Lehman
19 side of the table and the Barclays side of the table about the
20 use of that term, "book value"?

21 A. I'm not aware of that.

22 Q. And do you know when the term "book value" came to be used
23 in the asset purchase agreement, sir?

24 A. No, sir.

25 Q. Now, at the time the asset purchase agreement was drafted,

1 Mr. Miller, was anyone at Weil Gotshal in a position to
2 independently assess whether the book value of the securities
3 to be transferred was seventy billion dollars as of the 16th of
4 September 2008?

5 A. I don't believe so.

6 Q. And was Weil Gotshal asked to assess or verify whether the
7 book value of the securities to be transferred stood at
8 approximately seventy billion dollars as of September 16th?

9 A. I wasn't asked and I can't speak for anybody else.

10 Q. To your knowledge, was anyone on your team asked to do
11 that?

12 A. I have no knowledge of --

13 Q. Did it ever come to your attention that anybody on your
14 team was doing work along those lines?

15 A. No.

16 Q. Okay. And were you or anyone else at Weil Gotshal, sir,
17 privy to any discussions between Lehman businesspeople and
18 Barclays businesspeople about whether the book value of Lehman
19 securities to be transferred stood at approximately seventy
20 billion dollars as of the 16th of September?

21 A. I was not involved.

22 Q. Do you know if anyone else at your firm was?

23 A. I don't know.

24 Q. Now, do you recall, Mr. Miller, when the asset purchase
25 agreement was finalized?

1 A. There was an amended asset purchase agreement. I can't
2 remember -- that was Wednesday or Thursday. And that amended
3 asset purchase agreement then was subject to the clarification
4 letter.

5 Q. My question goes to the first asset purchase agreement,
6 sir. Do you recall what time during the day on the 16th or
7 early the 17th was it finalized, do you know?

8 A. I can't recall. I don't know if that was changed.

9 Q. Now, if you would take a look, Mr. Miller, at tab 118 in
10 your book. It's --

11 A. Okay.

12 Q. 118.

13 A. Yes.

14 Q. It's a copy, sir, and it's in evidence, of the sale
15 motion --

16 A. Yes.

17 Q. -- that was filed on the 17th of September. Now, in the
18 organized chaos of those days, sir, I take it the sale motion
19 was done probably overnight, yes?

20 A. Yes, that's fair.

21 Q. And it was filed, as I understand it, I think, as you said
22 this morning, early afternoon or at some point early-ish in the
23 day on the 17th, correct, sir?

24 A. Hold on just one minute. No. This was the hearing to
25 consider the entry of the sale procedures order. The hearing

1 day was September 17th. My recollection is that this was filed
2 on the 16th.

3 Q. Okay. And I may have picked up a different nomenclature
4 of that over the last year, sir, so we'll call that the sale
5 procedures order?

6 A. Yeah.

7 Q. Okay, thanks. And the sale procedures order was the
8 subject of the appearance before Judge Peck on the 17th of
9 September, yes?

10 A. That's correct.

11 Q. Okay. And were you -- well, I know members of your team
12 would have been -- the question is to yourself, sir. Were you
13 involved in the drafting of the sale procedures motion?

14 A. Yes.

15 Q. And was this the first -- was the sales procedures motion
16 the first step in addressing to the Court -- in bringing to the
17 Court the need for an approval of the Lehman/Barclays
18 transaction?

19 MR. GAFFEY: That's a terrible question.

20 Q. Was there anything before the sale motion where the Court
21 was informed approval would be required?

22 A. There may have been references to the proposed transaction
23 in the motion for the approval of the DIP financing.

24 Q. Okay.

25 A. I have a vague recollection there was some hearing on

1 Tuesday, the 16th. So -- and in that hearing, I think -- I
2 believe that we did alert the Court that there was a
3 transaction being negotiated.

4 Q. Sure. Okay. Mr. Miller, I'm sorry. Could you pull the
5 microphone a little closer because I'm having a little trouble
6 hearing you.

7 A. Okay.

8 Q. Thank you. That's much better. Now, in the sale
9 procedures motion, the debtor described the proposed
10 transaction, is that right?

11 A. Yes.

12 Q. I want to ask you about a couple of portions of it. And I
13 would direct your attention, please, to paragraphs 9 and 10 of
14 the motion. And this is within the section of the motion that
15 refers to the need for an expeditious sale.

16 A. Yes.

17 Q. And in paragraph 9 of the motion, you refer to the
18 purchaser paying approximately 1.7 billion in cash for the
19 purchased assets. Do you see that?

20 A. Yes.

21 Q. Okay. And what was the basis of the calculation of 1.7?
22 Did that include the real estate?

23 A. That was the real estate.

24 Q. Okay. And in paragraph 10, sir, it reads as follows:
25 "Upon consummation of the transaction, the purchaser will

1 assume ownership of substantially all operations of LBI
2 including assumption of seller's liabilities under assumed
3 contracts and performance under seller's obligations as to
4 securities and other transactions. All remaining customer
5 accounts will be transferred to the purchaser. The purchaser
6 also will assume substantial liabilities relating to LBI's
7 employees estimated at approximately 2.5 billion. The sale
8 will relieve LBHI of exposure based upon its guaranties of many
9 of LBI's obligations."

10 Sir, the number in there of 2.5 billion, can you tell me
11 how that figure was derived?

12 A. I can't tell you how it was derived. I can tell you it
13 was furnished -- it was by Lehman.

14 Q. Okay. And I take it from your answer that Weil Gotshal
15 played no role in calculating or deriving that figure.

16 A. That's correct.

17 Q. Do you recall who within Lehman -- do you know who within
18 Lehman supplied that figure to Weil Gotshal?

19 A. I think I got the figure from Mr. McDade.

20 Q. Now, if you could turn, Mr. Miller, to paragraph 14 of the
21 sales procedures motion -- it's on page 6.

22 A. Yes.

23 Q. Where there is a description in bullet form of the
24 purchase agreement -- are we in the same place?

25 A. Yes, I am.

1 Q. Okay. And in the third -- actually, in the fourth bullet
2 point entitled "Assumption of Contracts" --

3 A. Yes.

4 Q. -- there's a reference in there -- there's a -- well, let
5 me read it. "The purchaser shall have the right but not the
6 obligation to take assignment of contracts and leases which are
7 designated for assumption and assignment by purchaser. The
8 parties estimate that the cure cost associated with such
9 assumptions and assignments will be approximately 1.5 billion
10 dollars."

11 Can you tell the Court, sir, how the 1.5 billion dollar
12 figure that's recited there was derived?

13 A. No. As I said, we did not participate in the derivation.
14 It was a figure that was given to us.

15 Q. Okay. And the reference to the parties in there, sir, am
16 I correct that it refers to the parties to the agreement?

17 A. I believe so.

18 Q. Okay. And do you know how the parties to the agreement
19 went about estimating the cure cost? What mechanically was
20 done to figure out what contracts there were that would or
21 might be assumed or what they were worth?

22 A. I can only assume and tell you that somebody within Lehman
23 did a calculation.

24 Q. Okay. Was anybody at Weil Gotshal involved in any aspect
25 of the reviewing of contracts that could or might be assumed?

1 A. Only to the extent of advising Lehman that if you assume a
2 contract and there is a default amount, a monetary default, in
3 order to effect an assignment, you have to -- and an
4 assumption, you have to cure that.

5 Q. I'm more on the mechanical over the table, looking at the
6 document --

7 A. The calculation --

8 Q. -- side of things, sir.

9 A. The calculation of the 1.5 billion dollars?

10 Q. Yes.

11 A. No. We were not involved in that.

12 Q. Okay. And I take it there were -- or would you tell us
13 please whether there were any discussions between personnel at
14 Weil Gotshal and anybody from Barclays, the businesspeople or
15 their lawyers, about Barclays' view of whether the estimate
16 that cure cost associated with such assumptions and assignments
17 will be approximately 1.5 billion dollars was accurate?

18 A. I was not involved in any -- I think you have to bear in
19 mind my description of organized chaos continued. There were
20 maybe literally hundreds of different conversations going on at
21 the same time. And maybe thousands of e-mails going on at the
22 same time.

23 Q. I take it, in that context, Mr. Miller, if I were to --
24 would you be able to tell me who or when or by what manner the
25 1.5 million dollar number was given to the Weil Gotshal folks

1 for the drafting purposes?

2 A. We gave the Lehman people the legal standards. And then
3 they took those legal standards and I assume they applied it in
4 coming up with the calculation. And somebody within the
5 financial section of Lehman made the calculation.

6 Q. My question is a little more micro than that. Do you know
7 who handed what, who handed any piece of paper to anybody at
8 Weil Gotshal --

9 A. I can't

10 Q. -- with that number on it? How it was --

11 A. I can't get that granular.

12 Q. You don't know?

13 A. I can't get that granular.

14 Q. Okay.

15 A. I know Mr. McDade gave me a figure when we were preparing
16 these papers.

17 Q. Now, directing your attention --

18 MR. BOIES: We can take it off the screen, thanks.

19 Q. Directing your attention to the 17th, the afternoon of the
20 17th, Mr. Miller, that's when the initial sale procedures
21 hearing takes place before Judge Peck.

22 A. That's correct.

23 Q. And by the time you've come down to court for the sale
24 procedures hearing, the motion papers already had been filed,
25 correct?

1 A. Yes.

2 Q. Okay. And at the hearing, did you outline the terms of
3 the transaction for the Court?

4 A. I tried.

5 Q. Okay. I'd like to go through a few portions of that part
6 of the hearing. If you could turn to Exhibit 260 in your book.
7 That's the transcript of the sales procedures hearing on the
8 17th.

9 A. Yes.

10 Q. And directing your attention, Mr. Miller, to page 22,
11 lines 8 to -- well, 8 to 11. To the extent it puts it in
12 context for you, sir, although I'm sure your memory of it is
13 pretty good, if you want to read the portions before that. But
14 my question goes to lines 8 to 11. And it is what you
15 explained to the Court when you said: "looking at it from the
16 net of this transaction, there will be approximately 1.7
17 billion dollars yielded out of this transaction". What was the
18 calculation that got you to that number, please?

19 A. The cash portion of the transaction was literally tied to
20 the real estate. There would be no other cash other than the
21 250 million dollars which was attributed to the goodwill of
22 Lehman Brothers Inc. The building at 745 Seventh Avenue we
23 thought had a value -- I can't remember. I think it was, like,
24 1,450,000,000 dollars. And there were two data centers in New
25 Jersey which, combined, had another value, I think, maybe of

1 400 million dollars.

2 Q. And were assumed liabilities also part of the
3 consideration?

4 A. Yes. This was just a reference to the cash --

5 Q. Sure.

6 A. -- coming out of the transaction.

7 Q. And that's why I asked, by the time you were in court, the
8 sale motion's already been filed. And that also describes the
9 transaction --

10 A. As we understood it, yes.

11 Q. Okay. Now, if you could turn, sir, to page 23 --
12 actually, I should, Mr. Miller, first direct your attention to
13 page 22 starting at line 20 so we both have the topic in mind.

14 A. Okay.

15 Q. From page 22, line 20, through 23, line 4, you're
16 describing to the Court that Barclays has requested a breakup
17 fee in connection with the transaction. You see that?

18 A. I see it.

19 Q. And I take it one of the goals of this initial hearing was
20 to have the Court rule on the breakup fee issue right there and
21 not wait until the Friday sale hearing, yes?

22 A. Yes.

23 Q. Okay. And from lines -- and you describe the breakup fee
24 to the Court at a figure of 125 million dollars?

25 A. A hundred million dollars plus reimbursement of expenses

1 of up to twenty-five million dollars.

2 Q. Okay. And Judge Peck asks a question at that point about
3 how to equate the -- and I'm reading at line 7: "how to equate
4 that breakup fee and expense reimbursement with the purchase
5 price". And the Court says "I've attempted to assess the
6 notional value of the transaction because in addition to the
7 1.7 billion dollars, there's a reference to 1.5 billion dollars
8 in cure amounts and possibly as much as 2.5 billion dollars in
9 certain employee related severance expenses which may or may
10 not be triggered. For purposes of my evaluating the fairness
11 of the overall proposed breakup fee and expense reimbursement
12 as a percentage of the transaction, not that I need to do that
13 but frequently Courts are viewed as approving breakup fees
14 within a certain market range."

15 And then the Court puts this question: "How should I view
16 the fair value of the overall transaction?" And you gave Judge
17 Peck a fairly detailed description that begins at line 21. And
18 coming over to page 24, sir -- well, in your answer, sir, you
19 refer to the cash component and you refer to the 2.5 billion
20 dollars in employee related expenses. And then overleaf, sir,
21 you refer to the billion five for contract cure.

22 And why did you include those components, Mr. Miller, in
23 the answer to the judge's question about how the Court should
24 view the fair value of the overall transaction?

25 A. They were potential assumed liabilities that go to the

1 cost of the deal. And I think, as Judge Peck pointed out, the
2 severance expenses may or many not be triggered should they be
3 included in the context of determining what is an appropriate
4 breakup fee. This all related to the approval of the breakup
5 fee which, from my perspective in connection with this
6 transaction, was a request by Barclays but the likelihood of
7 anybody else coming in to bid was so minimal -- the universe of
8 potential bidders was so small that this was really a sideshow.
9 This was just to satisfy Barclays' need.

10 Q. And in responding to Judge Peck's question about the
11 overall value of the transaction, my question, sir, was --
12 well, my question is why did you select the cash and the two
13 components of assumed liabilities?

14 A. It was the easiest items to refer to.

15 Q. Okay. And they were the easiest items in the asset
16 purchase agreement? Is that --

17 A. Looking at what Lehman was getting out of the deal in
18 terms of the 1.7 and the liability -- the clear liabilities
19 that were being assumed just to establish a basis for the
20 breakup fee.

21 Q. Now, by the afternoon, sir, when you're appearing before
22 Judge Peck in connection with the sale procedures motion, had
23 yours or Weil Gotshal's knowledge concerning the derivation of
24 these figures grown any?

25 A. Grown from where?

1 Q. From nothing to something.

2 A. It was the same as I had already testified to.

3 Q. Okay. Now, at page 24 of the transcript, sir, starting at
4 line 9 and continuing through line 17, you describe to His
5 Honor a repo arrangement with a prospective purchaser which you
6 describe as the purchaser "backing up and allowing these repos
7 to be settled and to be financed. In addition, if this goes
8 forward, there will be a support agreement for this interim
9 period of two or three days where Barclays Capital will be on
10 premises, will be offering oversight and in the sole
11 discretion, may be willing to advance some monies in the
12 interim period."

13 As of the 17th, Mr. Miller, how involved, if at all, had
14 Weil Gotshal been in the negotiation or structuring or
15 documenting of the repo arrangement you described.

16 A. Which repo are you talking about?

17 Q. The one you described on the 17th.

18 A. That's a repo of -- I think was 15.8 billion dollars that,
19 if I recall correctly, was done on Tuesday. It was negotiated
20 between Lehman and Barclays and, I think, J.P. Morgan.

21 Q. Any Weil Gotshal role in those negotiations?

22 A. No.

23 Q. Any Weil Gotshal role in the documenting of that?

24 A. No.

25 Q. At any point during the week, Mr. Miller -- by the week, I

1 mean, the 15th -- the tumultuous week, the 15th through the
2 22nd of September -- was Weil Gotshal privy to any discussions
3 amongst Lehman personnel about defaulting on a repo as a means
4 of delivering a block discount to Barclays?

5 A. No.

6 Q. Now, directing your attention, Mr. Miller, to the sale
7 hearing on Friday the 19th. I want to first put that down as a
8 time milestone in between the appearance before the Court on
9 the 17th and then the appearance before the Court on the 19th.
10 Were there any other court appearances or filings in between
11 those two points?

12 A. I don't recall. There may have been some ancillary motion
13 or something.

14 Q. With regard to the sale transaction, I take it, the two
15 appearances before the Court on the 17th and the 19th were the
16 only -- and the filing of the sale motion itself, the sale
17 procedures motion, were the three means by which the sale
18 transaction was described to the Court, is that right?

19 A. That's correct.

20 Q. Okay. Now, at the sale hearing, you told us earlier this
21 morning that there was some delay in getting it started. There
22 was some work being done on a clarification letter and other
23 things and that at the beginning of the sale hearing -- as you
24 and Ms. Fife arrived --

25 A. We didn't arrive together.

1 Q. Okay. Well, actually, I should back up to that. How did
2 you come down here? Did you come down with anyone?

3 A. Yes.

4 Q. Apart from in a hurry. Did you come down with anyone?

5 A. Yes. I was escorted down by associates.

6 Q. Okay. And there had been changes in the deal during that
7 week that was your plan to report to the Court at the sale
8 hearing, is that right?

9 A. There were -- there was an amended asset purchase
10 agreement which I think was fil -- I believe was filed or
11 presented at the hearing. Other than that, I'm not quite sure
12 there was anything -- there wasn't much time between the close
13 of the sale procedures hearing --

14 Q. Right.

15 A. -- and the beginning of the sale hearing.

16 Q. But that's what my question goes to. In between the close
17 of the sale procedures hearing and the beginning of the sale
18 hearing, as I've got your answer so far, you're working on DIP
19 financing. Your prepping Mr. McDade.

20 A. DIP financing was finished by Wednesday.

21 Q. Okay. That's over. You're prepping Mr. McDade. You've
22 got him back at your office. It's organized chaos. The
23 beehive is going on on the thirty-second floor. I'm trying to
24 get a sense of how information got to you and to Ms. Fife about
25 the transaction you were going to describe as you prepared to

1 go there on the 19th. I take it, it was done in that organized
2 chaos that you described.

3 A. Ms. Fife was at 745 Seventh Avenue --

4 Q. Okay.

5 A. -- with Mr. Roberts and others. I took Mr. McDade back to
6 767 Fifth Avenue. And we live in a world of communications.
7 There were phone messages. There were conference calls. Mr.
8 McDade would have to go out and participate. And then there
9 was -- Mr. Ridings also had to be prepped.

10 Q. Okay. And you arrived in court separately from Ms. Fife?

11 A. I did.

12 Q. And approximately how long after you -- well, who got here
13 first?

14 A. I got here first.

15 Q. Okay. And how long after you got here did she get here?

16 A. Probably a half hour to forty-five minutes.

17 Q. Okay. And after Ms. Fife arrived, how long before the
18 sale hearing actually began?

19 A. I think, as I've already testified, thirty to forty-five
20 minutes.

21 Q. Okay. And the thirty to forty-five minutes, I want to be
22 sure that we're on the -- that I'm on the right page. You
23 referred to a session in the courtroom --

24 A. Yes.

25 Q. -- where the judge was off the bench where some changes in

1 the deal were described to the people assembled. Is that the
2 thirty minutes you're talking about?

3 A. Yes.

4 Q. Okay.

5 A. It was probably -- it was probably forty-five to an hour.

6 Q. Okay. So let me back up a little bit because I want to
7 address the timing of things as you get to court. You arrive;
8 Ms. Fife arrives. Approximately how much time elapses between
9 her arrival and the beginning of that off the record session?

10 A. Almost immediately after she came.

11 Q. Okay.

12 A. We asked the Court if we could have the time. And Judge
13 Peck was very considerate and he left the bench and we spent
14 that next forty-five minutes to an hour explaining where we
15 were and answering questions from the audience.

16 Q. And the purpose of that off the record session was to
17 explain the changes in the deal that had occurred since the
18 filing of the sale motion and the sale procedures hearing on
19 the afternoon of the 17th?

20 A. In very broad terms, yes, I guess that's an adequate
21 description.

22 Q. It was to bring people up to date.

23 A. Yeah.

24 Q. Okay. And how -- excuse me. How had you and Ms. Fife
25 learned what the changes were?

1 A. Ms. Fife was in -- as I said, at 745 Seventh Avenue.
2 She's prob -- I'm guessing now. She was probably in the
3 conference room where these things were discussed.

4 Q. Well, let me ask you, when she arrived -- before she
5 arrived, were you yourself up to date on the changes?

6 A. Not totally.

7 Q. Okay. And so it was Ms. Fife who had the last word on
8 what the changes were, she being the last to arrive.

9 A. She had the last word on the current status of events --

10 Q. Okay.

11 A. -- which, I believe, when the hearing started, I believe
12 Ms. Fife made a statement to the Court in which she described
13 what had transpired since the sale procedures hearing.

14 Q. Okay. And if you would turn, Mr. Miller, to tab 261 in
15 your book. That's the transcript of the sale hearing on the
16 19th.

17 A. 261?

18 Q. Yes, sir.

19 A. In my book, it's 260 -- oh, yeah, yeah. 261.

20 Q. Okay?

21 (Pause)

22 Q. Excuse me, Mr. Miller. It takes me a little while to page
23 through all the appearances. Here we go. Starting at page --

24 A. I think you're looking at page 46.

25 Q. Actually, if you don't mind, sir, I'd like to start at

1 page 43. You may remember, sir, the judge briefly took the
2 bench before this thirty minute session or so. And this is
3 during that portion. And you say to Judge Peck -- I'm on line
4 14: "In any event, Your Honor, as we described last Wednesday,
5 there are a lot of moving parts to this transaction. And
6 they've been moving with great velocity over the last days
7 since Wednesday. And as a consequence, Your Honor, there has
8 had to be some major changes in the transaction. And
9 unfortunately, they weren't finalized until about a half hour
10 ago. What I would propose, Your Honor, is that if Your Honor
11 will give us a recess for approximately a half hour so we can
12 explain orally to this audience" -- and then at that point
13 Judge Peck gives you the courtroom, takes an adjournment and
14 the description is made to the creditors -- to those in
15 attendance.

16 A. Is that a question.

17 Q. No.

18 A. Oh, okay.

19 Q. Here comes the question. Well, who had told you the
20 changes had been finalized only a half hour ago?

21 A. I have no specific recollection. It probably came in
22 through a phone call.

23 Q. And at the time that you addressed the Court before the
24 adjournment, did you yourself know what the major changes were?

25 A. Generally.

1 Q. Okay. You had a chance to talk to Ms. Fife about them?

2 A. Yes.

3 Q. Okay. Now, as you noted, sir, beginning on page 46, Ms.
4 Fife describes the changes to the Court, the Court having
5 now -- now being back in session. And that is more or less
6 immediately after the adjournment.

7 A. I'm sorry?

8 Q. That's more or less immediately after the adjournment is
9 the first thing she --

10 A. I wouldn't call it an adjournment. It was a recess.

11 Q. More or less immediately after the recess.

12 A. I'm trying to --

13 (Pause)

14 A. I think Judge Peck described it as a break. And on page
15 45, he left the courtroom and said we were adjourned until 5:15
16 provisionally. He actually came back at 5:41. So it was just
17 slightly less than hour.

18 Q. Okay.

19 A. And he asked would somebody tell him what happened. And
20 at that point, Ms. Fife made a presentation to the Court.

21 Q. Okay. And my question, Mr. Miller, is, to your knowledge,
22 when Ms. Fife made the presentation to Judge Peck about the
23 changes in the deal, was that -- were those -- was there
24 anything different about the description she gave to the Court
25 than had been said during the recess to those assembled.

1 A. I don't believe so.

2 Q. Now, we see that Ms. Fife gives a description at page 46.

3 My question to you, sir, is at that time, at that point, did
4 you or, to your knowledge, anyone else from Weil Gotshal have
5 any knowledge about a role that the repurchase agreement had
6 come to play in the transaction, in the agreement between
7 Lehman and Barclays?

8 A. I can't pinpoint the time -- you're talking now about the
9 forty-five billion dollar repo?

10 Q. Yes, sir.

11 A. I can't pinpoint the time when that occurred. It was not
12 significant because, in our view, Barclays was buying all the
13 assets of LBI and the collateral pledged for that repo -- which
14 was originally with the Federal Reserve Bank of New York, for
15 all assets of LBI. And I have my own views as to why the
16 Federal Reserve wanted to get out of that repo. And I assume
17 made a demand upon Barclays to step into the shoes of the
18 Federal Reserve Bank.

19 Q. When after the Fed made the demand that Barclays step into
20 the shoes, to your knowledge, did Barclays step into the shoes
21 of the Fed?

22 A. I believe so.

23 Q. Do you know the mechanics of how that was done?

24 A. No, sir.

25 Q. Did you know them at the time?

1 A. I think it was on Thursday the 17th.

2 Q. On Thursday the 17th, did you know the mechanics of how
3 Barclays stepped into the shoes?

4 A. They wired or hand-delivered or sent the single dollar
5 bills equal to forty-five billion dollars or thereabouts to the
6 Federal Reserve Bank and the Federal Reserve Bank undertook to
7 release the collateral. The collateral had to go through
8 JPMorgan Chase. These were securities. My understanding is
9 that there were a very substantial amount of securities. Even
10 though DTC agreed to stay open till midnight, they were unable
11 to transfer all of the securities to Barclays by midnight.
12 There was something like seven billion dollars in securities
13 that were not transferred as of that Thursday which created a
14 huge problem in connection with the closing.

15 Q. Do you know, sir, if the funds were actually wired from
16 Barclays to the Fed as opposed to from Barclays to Lehman?

17 A. I was not personally involved in it so I don't know.

18 Q. And my question, sir, is whether Weil Gotshal, any lawyers
19 at Weil Gotshal, had any role or involvement in that portion of
20 the transaction, arranging for the repo, seeing to the wire
21 transfers, documenting the repo, anything connected to the
22 repo.

23 A. We were not involved in the mechanics. We knew what was
24 happening.

25 Q. And did Weil Gotshal have any role of any kind in

1 determining the value of the collateral in that repo between
2 Lehman and Barclays?

3 A. We're not in the valuation business.

4 Q. Okay. Were you privy -- was anyone at Weil Gotshal privy
5 to the method by which the collateral and the repo was valued?

6 A. I don't really understand your question.

7 Q. Well, I understand you're not involved --

8 A. There was collateral at the Federal Reserve Bank. It
9 consisted of securities. The securities are what the
10 securities were.

11 Q. And to your knowledge, sir, was anybody at Weil Gotshal
12 asked to or involved in determining what the value of those
13 securities were?

14 A. As I stated, we're not valuation experts.

15 Q. And was anybody at Weil Gotshal privy to the method or
16 mechanism that the valuation experts used to determine how much
17 repo was in the collateral?

18 A. I don't know who valued it or if it was valued.

19 Q. Okay.

20 A. And I don't know if the Federal Reserve valued it. The
21 underlying premise of a repo is that the collateral securities
22 should exceed the amount of the money loaned. I think in the
23 context of what was happening in the marketplace, I believe --
24 this is just my impression and my opinion, the Fed was very
25 concerned about the value of the collateral sinking and the Fed

1 had no desire to end up as an unsecured creditor.

2 Q. And I take it, sir, that on the 17th or the 18th, neither
3 you nor, to your knowledge, anyone else at Weil Gotshal knew
4 one way or the other whether the stated values for the
5 collateral and repo were accurate or correct?

6 A. Mr. Gaffey, we were not running the business of Lehman.

7 Q. And did you or anyone at Weil Gotshal have any knowledge
8 or understanding, sir, of the makeup, the composition of the
9 particular securities that were the assets securing the repo?

10 A. The only knowledge that I had was that the Federal Reserve
11 Bank had said on Sunday that Lehman would have to comply with
12 the collateral value rules of the Federal Reserve Bank.

13 Q. As to the component parts of the collateral, what kind of
14 securities it was or -- do you know?

15 A. No. No.

16 Q. Did you know at the time?

17 A. No.

18 Q. Now, back at the September 19th hearing, sir, you'll
19 see at page 46, where you were before, starting at page (sic)
20 19, Ms. Fife describes changes in the deal to the Court and
21 says: "Let me try to summarize the changes that were made to
22 the transaction. In terms of the economic changes, they result
23 largely because of the markets, unfortunately. And from the
24 time that the transaction was actually entered into till now,
25 the markets dropped and the value of the securities dropped as

1 well.

2 "So, originally, we were selling assets that had a value
3 of seventy -- approximately seventy billion dollars. And
4 today, Your Honor, we're only selling assets that have a value
5 of 47.4 billion dollars."

6 Did you know one way or the other, sir, at the time that
7 Ms. Fife was describing this, who had calculated the 47.4?

8 A. It was the figure given to us by Lehman.

9 Q. Okay. And when the fig -- do you know who at Lehman gave
10 that figure to you or Ms. Fife?

11 A. I'm pretty sure it came from Mr. McDade.

12 Q. Okay. And do you recall Mr. McDade giving any description
13 of how the 47.4 had been calculated?

14 A. Again, sir, in the context of what was happening and all
15 of the turmoil that was going on, no.

16 Q. Okay. So the 47. -- do you know what the basis was for
17 the assessment that the number had dropped from seventy billion
18 dollars to 47.4 because of a drop in the markets?

19 A. I don't understand your question.

20 Q. Well, do you know, for example, sir, whether one reason
21 for the drop from the seventy to the 47.4 had to do with
22 unavailability of some collateral that had been promised at the
23 beginning of the week but couldn't be delivered?

24 A. I never heard that.

25 Q. Okay. Did anybody tell you that the 47.4 was against an

1 indentified body of collateral and it was valued in the
2 following way?

3 A. No.

4 Q. Did you or Ms. Fife have anything other than the 47.4
5 billion dollar number from your client to give to the Court?

6 A. That's what we had.

7 Q. Okay. And Ms. Fife, in her presentation about the changes
8 in the deal continues on page 47, line 5: "Barclays is
9 assuming liabilities, however, of 45.5 billion dollars in
10 connection with those assets."

11 Did you or Ms. Fife have any more detail than what she
12 told the Court?

13 A. As I think I testified previously, the economic terms of
14 the transaction were negotiated between Lehman personnel and
15 Barclays personnel.

16 Q. Okay. So I take it you had no knowledge at the time as to
17 who calculated those liabilities, the method they used to
18 calculate them, the derivation of that number.

19 A. I do not.

20 Q. And further down in her description of the changes in the
21 transaction, Ms. Fife says "Barclays is still agreeing to pay
22 the cure amounts on any leases that it assumes or that we
23 assume and assign to it. Barclays is also agreeing to the same
24 employee compensation arrangements. And it is also agreeing to
25 pay the 250 million dollars of goodwill to LBI."

1 By the time Ms. Fife was describing to the Court on the
2 19th at the sale hearing the cure amounts and the employee
3 compensation, I take it Weil Gotshal's knowledge or basis as to
4 how those numbers had originally been calculated had not
5 increased or grown?

6 A. Had not what?

7 Q. You still had those numbers from your client and didn't
8 know how they calculated it.

9 A. That's correct.

10 Q. Now, sir, why is it that immediately after the recess when
11 the judge comes back on the bench, why was Ms. Fife describing
12 drops in asset value to the court?

13 A. There had been an enormous change in values because of
14 what was going on in the week. As I said, the bottom was
15 falling out of the market. It was before Secretary Paulson had
16 asked for 700 billion dollars to save the economy. AIG had
17 occurred on Tuesday when the Treasury or the Federal Reserve, I
18 can't remember which, agreed to put up eighty-five billion
19 dollars as an infusion to AIG. The markets had frozen.
20 Commercial Paper could not be sold. Major U.S. corporations
21 could not redeem Commercial Paper. We were in a major
22 tailspin.

23 Q. My -- of all the things that could have been told to the
24 Court -- I mean, my question is why was the value of the assets
25 a topic that was chosen --

1 A. 'Cause I think --

2 Q. -- to describe to the Court.

3 A. I think on the 17th we may have referred to the seventy
4 billion dollar amount.

5 Q. Well, I guess, then I have the same question about the
6 hearing on the 17th. Why are you or Ms. Fife describing the
7 value of assets to the Court when you're talking about the sale
8 transaction?

9 A. To give the Court a guide as to what was involved in the
10 transaction.

11 Q. And why are you or Ms. Fife on the 17th and the 19th
12 describing the value of the assumed liabilities?

13 A. Because that was the nature of the transaction.

14 Q. The reference that Ms. Fife made to 250 million dollars in
15 goodwill, do you know how that number was agreed?

16 A. It's just a negotiation with Barclays.

17 Q. Okay. Again, a number supplied by the client?

18 A. No. It was the result of a negotiation.

19 Q. Okay.

20 THE COURT: Mr. Gaffey, it's just past 11:00 and we've
21 been at this since about 9:30. It occurs to me that if this a
22 convenient time we might take a morning break.

23 MR. GAFFEY: Absolutely, Your Honor.

24 THE COURT: Fine. Let's break until 11:15.

25 (Recess from 11:03 a.m. until 11:22 a.m.)

1 THE COURT: Be seated, please.

2 MR. GAFFEY: May I proceed, Your Honor?

3 THE COURT: Please do.

4 RESUME DIRECT EXAMINATION

5 BY MR. GAFFEY:

6 Q. Before the recess, Mr. Miller, we were talking about the
7 repurchase agreement. Did it ever come to your attention or to
8 your knowledge the intention of any -- the attention of anyone
9 else at Weil Gotshal that on the morning of the 19th Barclays
10 had demanded that certain repo collateral be substituted?

11 A. Certain repo collateral be substituted for what?

12 Q. For what was already in the repo?

13 A. No.

14 Q. And had it come to your attention by the time the sale
15 hearing began, that on the morning of the 19th of September,
16 Barclays had demanded additional assets?

17 A. I'm not sure I understand what you mean by additional
18 assets.

19 Q. That Barclays had made a demand on the morning of the 19th
20 saying there wasn't enough value in the deal for it to close,
21 and therefore demanded additional assets?

22 A. I was aware that Barclays was concerned about the value of
23 the transaction and that because of what was happening in the
24 markets, that the transaction was becoming less attractive.

25 Q. Did anyone from your client, sir, tell you before the sale

1 hearing began, that Barclays had said it would not close if
2 more assets, more value, was not identified and added to the
3 deal?

4 A. No, sir.

5 Q. Do you have any knowledge about a search for additional
6 value or assets taking place within Lehman prior to the
7 commencement of the sale hearing?

8 A. Prior to the commencement of the sale hearing? No.

9 Q. Now, if you would turn, please, Mr. Miller to tab M-38 in
10 evidence in your book. Are you there, Mr. Miller?

11 A. Yes.

12 Q. At the time of -- by the time of the sale hearing, sir,
13 had you seen this document entitled "Notice of repurchase date
14 notice of termination"?

15 A. No, I did not.

16 Q. Were you aware, sir, at the time that the sale hearing
17 began, in any fashion, that the repo agreement between Lehman
18 and Barclays had been terminated?

19 A. No, I was not.

20 Q. Did there come a time when you became aware of that?

21 A. No.

22 Q. Did there come a time, to your knowledge, when others at
23 Weil Gotshal became aware of that?

24 A. I'm not aware of that.

25 Q. Now, you referred earlier today to a clarification letter

1 that was being worked on to reflect the changes in the deal.

2 And do you recall, sir, that Ms. Fife referred to that
3 clarification letter at the sale hearing on the 19th?

4 A. Yes.

5 Q. Was a draft of the clarification letter in existence at
6 the time of the sale hearing?

7 A. There was a draft being worked on.

8 Q. Did there come a point during the sale hearing where a
9 draft made its way to the courtroom?

10 A. My recollection is that near the end of the hearing, a
11 draft arrived that was reviewed and it was determined wasn't
12 consistent with the understanding of the parties.

13 Q. And had it been the plan to offer the clarification letter
14 to the Court during the sale hearing?

15 A. I don't believe that we actually had a plan.

16 Q. Had a plan, okay. If you could turn to tab M-137 in your
17 book, sir. It's a document in evidence consisting of an e-mail
18 from David Murgio to a long list of people saying, "Please find
19 attached a revised version of the clarification letter
20 reflecting our conversation this afternoon. The black-line is
21 marked to reflect changes from the draft previously circulated
22 by Cleary."

23 And do you know, sir -- well, David Murgio is your
24 colleague at Weil Gotshal?

25 A. He was a senior associate at the time.

1 Q. And is the document marked as Exhibit M-137 the draft that
2 was in existence at the sale hearing, the one that was reviewed
3 and found to be incorrect?

4 A. I can't -- I don't have any personal knowledge of that.

5 Q. Okay. Were you personally involved in the process of
6 reviewing drafts of the clarification letter?

7 A. No, I was not.

8 Q. Was there ever a point where you were involved in
9 reviewing drafts of the clarification letter?

10 A. No.

11 Q. And so, was there ever a point from the sale hearing
12 through the closing where you were involved in reviewing drafts
13 of the clarification letter?

14 A. I saw drafts. I was not involved in the drafting.

15 Q. Now, when was a clarification letter finalized?

16 A. Precisely, I can't tell you. It was over the weekend of
17 the 19th to the 22nd.

18 Q. Do you recall, sir, when the clarification letter was
19 signed?

20 A. I think it was signed before the closing ended.

21 Q. Would that be on the Monday morning?

22 A. It could have been. It could have been earlier. I don't
23 know.

24 Q. Okay. And do you recall what it was about the draft
25 clarification letter that made its way down to court on Friday

1 that was wrong?

2 A. Other than looking at the black-line versus what you say
3 is the draft, no.

4 Q. And in your conversation with Mr. Roberts, did he tell you
5 what was wrong with it? I understand there's a million things
6 going on. So was it as short as, this isn't right, we have to
7 do it later; or this isn't right because, and he gave you a
8 reason?

9 A. I personally was not involved. As I told you, the -- we
10 didn't leave the courtroom until 2:30 a.m. or thereabouts. I
11 had a nine o'clock appointment at another client in the
12 morning. So I was not there in the morning of the -- I guess
13 that was the 20th.

14 Q. I'm just a little surprised you had time for another
15 client on Saturday morning, sir.

16 A. When the client demands, the client demands.

17 Q. That's right. Would you take a look, please at tab 53 in
18 your book, sir?

19 A. 53?

20 Q. Five-three, yes.

21 A. Yes, sir.

22 Q. And this is a document also in evidence, Mr. Miller, and
23 it is a draft sent under cover of an e-mail from Robert
24 Messineo on Saturday, September 20th, at 2:39 p.m., containing
25 a draft clarification letter. Do you recall -- I take it from

1 your prior answers, you may not -- do you recall if you saw
2 this particular draft?

3 A. I don't recall.

4 Q. That said, let me direct your attention anyway to where
5 the black-line begins. And I have to apologize, this is not
6 Bates numbered. So if you could leaf through it to where the
7 black-line portion of the document begins? At least the Bates
8 numbers are cut off. It's after Bates 24261.

9 A. I don't think I have a black-line.

10 Q. Within Exhibit --

11 A. I'm looking at M-53. My copy in here is not black-lined.

12 Q. Are you in tab 137, Mr. Miller?

13 A. We're back to 137?

14 THE COURT: There are two documents, one is black-
15 lined and one is not.

16 Q. I've got you on the wrong document. Tab 137, please.

17 THE COURT: Can I just clarify that I have the right
18 document?

19 MR. GAFFEY: As soon as I'm --

20 THE COURT: Under tab M-53 in my binder, there are two
21 versions of the letter, clean and black-line.

22 MR. GAFFEY: Right.

23 THE COURT: The black-line is at the back end of --

24 MR. GAFFEY: If I could -- I beg your pardon, Your
25 Honor. I was --

1 THE COURT: No, I'm just trying to understand what's
2 in the binder and what you're trying to accomplish right now.

3 MR. GAFFEY: Let me back up and start over a little
4 bit.

5 BY MR. GAFFEY:

6 Q. Let's go back to tab M-53.

7 A. Yes.

8 Q. And tab M-53 is the Messineo Saturday, September 20th
9 e-mail, yes?

10 A. Messineo.

11 Q. Messineo.

12 A. Yes.

13 Q. And about halfway through that document begins a black-
14 line.

15 (Pause)

16 A. I'm going -- I've gone right up to the signature page, and
17 I don't have any black-line.

18 MR. GAFFEY: Your Honor, may I approach? I have
19 another copy of 53.

20 THE COURT: Yes, you may approach.

21 MR. GAFFEY: Thank you.

22 Q. Mr. Miller, I've handed you the original of Exhibit M-53
23 and it's opened to where the black-lined page begins. And so
24 I'm sure we're on the same page, sir, that black-line should
25 say at the top, "WGM Final September 20, 2008 a.m."?

1 A. This black-line that you just handed to me says "WGM
2 Draft," stricken out, "Final September 20, 2008 7:30 p.m.,"
3 stricken out. And it's got an a.m.

4 Q. We're in the same place, sir.

5 A. Okay.

6 Q. And directing your attention down to the definition of
7 purchased assets in that black-line?

8 A. Yes.

9 Q. Do you see, sir, that there are changes made?

10 A. Yes.

11 Q. And at the bottom of page 2, and overleaf -- at the bottom
12 of page 1 and overleaf to page 2, I'd ask you to take a look at
13 what was stricken from that paragraph and what was added in
14 paragraph 1(ii), running from pages 1 to 2 of the exhibit.

15 A. Do you want me to read it?

16 Q. No, just take a look at it to yourself. The question,
17 sir, is going to be: do you have any knowledge about the
18 circumstances under which the definition was changed from the
19 language that's stricken out on page 2 to the language that's
20 contained on page 1 in the black-line?

21 A. Question again, please?

22 Q. Do you know -- do you have any knowledge about the
23 circumstances under which that change in the definition of
24 purchased assets was made?

25 A. I was not a party to the negotiations with respect to the

1 drafting.

2 Q. And if you would go back to your book, Mr. Miller, you
3 should find in there tab M-138, which is Exhibit M-138 in
4 evidence.

5 A. Yes.

6 Q. And have you seen that document before?

7 A. I don't have any recollection of it.

8 Q. Do you recall a point over the weekend of the 20th and the
9 21st of September, Mr. Miller, when some language was proposed
10 for inclusion in the clarification letter concerning the
11 termination of the repo?

12 A. I don't recall language about it. I recall some
13 discussion about the repo.

14 Q. What do you recall about the discussion about the repo?

15 A. That the repo was essentially going to be canceled and
16 the -- it was essentially a credit against the purchase price.

17 Q. And if you would turn, sir, to tab M-3 in your book, sir.
18 It's the final of the clarification letter in evidence.

19 A. What's the number, again?

20 Q. It's M-3.

21 A. M-3. Yes.

22 Q. Now, was there a point, sir, in the closing that took
23 place over the weekend and through Monday morning, when a
24 decision was made whether or not to bring this final
25 clarification letter back to the Court?

1 A. The clarification letter was going to be attached to an
2 order, I think, that was submitted the following week.

3 Q. Was there a discussion about whether the clarification
4 letter should or should not be brought back to the Court prior
5 to the closing?

6 A. There was some discussion about whether there had been any
7 material changes in the transaction. And the conclusion was
8 not.

9 Q. Okay. Would you describe that discussion to the Court?

10 A. I did not really participate except for a very minor
11 event.

12 Q. Was there a point where you asked others, including
13 lawyers from Cleary at a closing table, whether anyone thought
14 there were changes that required court approval before the
15 closing?

16 A. There was a discussion. I can't recall specifically. I
17 think the Cleary people were involved, yes.

18 Q. And at the time that discussion took place -- at any time
19 prior to that discussion, sir, had there been any discussions
20 back and forth between Lehman and its representatives and
21 Barclays and its representatives, about any implications under
22 the Bankruptcy Code concerning the termination of a repurchase
23 agreement?

24 A. No.

25 Q. And when the discussion that you recall took place about

1 whether the clarification letter needed to be brought to the
2 Court, was that a discussion that included representatives of
3 Barclays? Do you remember?

4 A. I can't be a hundred percent sure. It may have. I think
5 it also included representatives of the creditors' committee
6 and maybe -- I don't have a clear recollection -- maybe the
7 representatives of the SIPC trustee.

8 Q. And at the time the decision was made about whether or not
9 to bring the clarification letter back to the Court, did you or
10 anyone from Weil Gotshal, by that time, have knowledge about
11 the fact that the repo had been terminated?

12 A. Yes.

13 Q. And --

14 A. I don't think it was a question of bringing the
15 clarification letter back to the Court. The question was
16 whether the transaction had changed in any material fashion.
17 And our conclusion was, it had not.

18 Q. I put that out there as a point in time. At any point
19 before the discussion took place about that, were you or anyone
20 else from Weil Gotshal aware that the repo had, in fact, been
21 terminated by Barclays?

22 A. I don't know what you mean by terminated. I don't think
23 that's the correct terminology. The repo was going to be -- if
24 you want call it -- rescinded. It had no material effect on
25 the transaction since the collateral security relating to the

1 repo were assets of LBI, and would be going back to LBI, and
2 transferred to Barclays in any event. So in effect, it was
3 sort of a shortcut.

4 Q. At the time the decision was made, did any of the lawyers
5 have knowledge about the relative size of the amount advanced
6 against the collateral posted, in terms of value?

7 A. I think you have to understand that the values were so
8 volatile during this period of time, the understanding was that
9 if the Fed had done its job, the collateral value would have
10 been somewhat in excess of the loan amount. I think there was
11 serious consternation as to whether that collateral still had
12 any excess value over and above the loan value.

13 Q. Do you know who conducted the valuation of the repo and
14 the Fed collateral?

15 A. I have no idea, except I know that Lehman people were
16 concentrating on it.

17 Q. Do you know who conducted the valuation of the collateral
18 in the Lehman-Barclays repurchase agreement?

19 A. I believe Mr. Tonucci was involved. I think Alex Kirk was
20 involved. Jim Seery was involved. Mr. McDade would come into
21 the room from time to time. There were numerous people there
22 from Barclays. As I said, there were computer runs that were
23 very extensive. And I think they were going through it, as I
24 recall, CUSIP number by CUSIP number.

25 Q. And do you know if a collateral agent also had -- do you

1 know if a collateral agent had also produced a valuation of the
2 repo?

3 A. Who was the collateral agent?

4 Q. Bank of New York.

5 A. Not that -- not that I'm aware of.

6 Q. And just a couple more questions and then I'll be done,
7 sir, with regard to the cure and comp elements. Was it --
8 would you agree, sir, that the two billion in comp, that the --
9 would you agree that the assumption of compensation liabilities
10 by Barclays was part of the consideration in the asset purchase
11 agreement?

12 A. The assumption of some exposure for severance and bonus
13 compensation was part of the transaction. It was an estimate,
14 and it had a lot to do with how many employees Barclays would
15 continue to employ after the ninety-day period had expired.

16 Q. I may not have put the question well. The question is
17 whether you considered it to be part of the consideration in
18 the contract?

19 A. I said, the assumption of the exposure was part of the
20 deal.

21 Q. And was that also true with respect to the cure?

22 A. Yes, but nobody knew the exact amount or what it would be.

23 MR. GAFFEY: Your Honor, I have nothing further.

24 Thank you, Mr. Miller.

25 THE WITNESS: Thank you.

1 MR. WERDER: For the record, Your Honor, Richard
2 Werder of Quinn Emanuel for the committee. The committee has
3 no questions at this time.

4 MR. MAGUIRE: If it please the Court.

5 DIRECT EXAMINATION

6 BY MR. MAGUIRE:

7 Q. Mr. Miller, I'm Bill Maguire for the SIPA trustee.

8 A. Good afternoon.

9 Q. Now, sir, I'd like to start by asking you about
10 discussions that occurred over the weekend of the clarification
11 letter, concerning an asset that ended up in the clarification
12 letter involving some 769 million dollars of securities in the
13 account that was referred to as the customer reserve account,
14 or the Rule 15c3-3 account.

15 A. Yes, sir.

16 Q. You have an understanding that that was a lockup account?

17 A. Yes.

18 Q. You understood that the assets in that account were set
19 aside for the exclusive benefit of Lehman's customers?

20 A. I had a lot of experience with 15c3-3 accounts.

21 Q. And that's an account that's regulated by the Securities
22 and Exchange Commission?

23 A. Correct.

24 Q. Can you tell us, what was the agreement between the
25 parties with respect to that 769 million?

1 A. During the early morning hours of Monday, whatever the day
2 Monday was -- the 22nd -- it came to my attention that Barclays
3 asserted that it was entitled to the transfer of the 15c3-3
4 account, which, as you said, had something like 769 million
5 dollars in securities, and I think close to a billion dollars
6 in cash. And I got into a debate with, I think it was Michael
7 Klein who was advising Barclays, that Barclays was not entitled
8 to that account. It was a customer protection account. It was
9 subject to approval by the SEC in terms of release. And there
10 was actually a letter that related to the prior transaction
11 when Barclays was negotiating to buy the entire Lehman
12 enterprise, that was either addressed to the SEC asking for
13 release of that account in connection with that transaction,
14 which was outdated. I think it was dated sometime the prior
15 week.

16 Barclays' position was that since they were taking the
17 customer accounts of the LBI business, they were entitled to
18 that account. I had previously been engaged in cases where I
19 had transferred customer accounts, and I did not transfer the
20 15c3-3 account. It was held back to protect the customers. So
21 there was an argument which involved certainly Mr. Klein,
22 myself, Tom Roberts, and representatives of the creditors'
23 committee were there. I think somebody may have been there
24 from your office. I can't recall directly.

25 And there were two points we were -- I was making. One,

1 it's a customer protection account. You can't have it unless
2 the SEC releases it, number one. Number two, we had made a
3 representation to the Court that no cash was going to Barclays.
4 And there was no way we were going to let that billion dollars
5 go to Barclays.

6 This was, as I say, in the early morning hours of Monday
7 the 22nd. There was a lot of pressure to get this deal
8 approved -- I mean, consummated. And Mr. Klein went back in --
9 there was a room set up for the Barclays people on this
10 conference room center. And he went back into the room, came
11 back and made a proposal that Lehman keeps the billion dollars,
12 that would be LBI, and if they could get it released from the
13 SEC, the securities.

14 Q. So the billion dollars in cash was going to stay with
15 Lehman?

16 A. Correct.

17 Q. And the 769 million dollars, subject to it being
18 regulatorily appropriate, would be transferred as part of the
19 purchase price?

20 A. That's the essence of that agreement.

21 Q. Did you at any time enter into any commitment on behalf of
22 Lehman that Barclays would get the 769 million dollars,
23 unconditionally?

24 A. I assume when you say me, you're talking about Lehman?

25 Q. I'm referring actually to you personally or anyone that

1 you know acting on behalf of Lehman?

2 A. Absolutely no commitment.

3 Q. Did you or anyone that you know acting on behalf of
4 Lehman, undertake or give Michael Klein or anyone at Barclays a
5 commitment that if there was a regulatory problem and the 769
6 million dollars in securities could not be transferred from
7 inside the 15c3 account, Lehman would be required to substitute
8 and provide 769 million dollars from somewhere outside that
9 account?

10 A. Absolutely not.

11 Q. A name came up earlier, Mr. Robert Messineo?

12 A. Yes.

13 Q. Sir, can you tell me, what was his role in this
14 transaction?

15 A. He's a partner at Weil Gotshal. He was part of the group
16 that was working on closing. And I believe he was involved in
17 the 15c3 draft.

18 Q. Sir, now I'd like to ask you some questions with respect
19 to Lehman's relationship with the Depository Trust Clearing
20 Corporation. You understand that there were some issues that
21 had arisen with respect to Lehman's relationship with the
22 Clearing Corporation, that by the weekend threatened or
23 jeopardized the progress of the sale itself?

24 A. Correct.

25 Q. At the sale hearing, there had been some kind of agreement

1 that had been reached with the Depository Trust Corporation, in
2 which they were provided with certain residential mortgage
3 securities and also with a 250 million dollar holdback. Do you
4 recall that?

5 A. I recall that Sheldon Hirshon from the Proskauer firm
6 appeared at the hearing on the 19th and described that there
7 was a major problem at DTCC, which is a combination clearing
8 exchanges, where DTCC was very concerned that the level of
9 fails had increased dramatically and that the clearing
10 corporation was -- would be liable and that there was not
11 sufficient collateral to support DTCC opening up the exchanges.
12 And that was a major concern.

13 Q. And while DTCC had been promised certain residential
14 mortgage securities, over the weekend it transpired that they
15 were not available. Do you recall that?

16 A. I recall that, yes.

17 Q. And Barclays had to enter into negotiations with DTCC to
18 see if they could come to some new arrangement?

19 A. Well, Barclays' position was, if we can't clear, then we
20 don't have a business. So that was a major problem from
21 Barclays' perspective and from our perspective. And my
22 recollection is that Mr. Hirshon who was -- Hirshon, who was at
23 the closing, and Barclays' representatives went off someplace,
24 another conference room, to negotiate a resolution.

25 Q. And what was your role in Barclays' negotiations with the

1 **Depository Trust Clearing Corporation?**

2 A. We had no role.

3 Q. And can you explain why you and your firm did not
4 participate in those negotiations --

5 A. It was --

6 Q. -- with Barclays and the DTCC?

7 A. -- it was a problem for Barclays to have a clearing
8 facility -- having clearing facilities. And it was something
9 that would have to be worked out between DTCC and Barclays,
10 going forward, post-closing.

11 Q. Were you, at any time, invited into any of those
12 negotiations?

13 A. I wasn't, and I don't believe anybody else at Weil Gotshal
14 was. It was very similar to the problem that arose with
15 JPMorgan Chase and Barclays. And that was resolved in
16 something similar to that, where Barclays and JPMorgan Chase
17 went off to another conference room on some part of the floor
18 and spent four or five hours negotiating that particular
19 problem.

20 Q. Did you receive reports from Barclays as to the progress
21 of the negotiations with the Depository Trust Clearing
22 Corporation?

23 A. Progress reports?

24 Q. Yes.

25 A. No.

1 Q. Did you generally hear from the Barclays representatives?

2 A. Only that they were working it out.

3 Q. And did you ultimately come to understand that an
4 agreement was reached between Barclays and the Depository Trust
5 Clearing Corporation?

6 A. Yes.

7 Q. And were you informed that as part of that agreement, the
8 Depository Trust Clearing Corporation would be getting that
9 holdback, the 250 million dollars limited guarantee?

10 A. I did not have specifics, but I knew there was additional
11 collateral for DTCC.

12 Q. Did anyone from Barclays inform you that as part of the
13 agreement with the DTCC, Barclays had specifically agreed that
14 all of the assets that Lehman had at DTCC would be excluded
15 assets under the agreement, and would remain subject to the
16 authority of the trustee?

17 A. I have no recollection of that.

18 Q. Did you review Barclays' letter agreement with the DTCC?

19 A. I did not see it during that weekend, and I did not see it
20 until a long time afterwards.

21 Q. Let me ask you this question, sir. The Court has before
22 it two agreements. Under one, the clarification letter, the
23 assets in question -- purchased assets, they go to Barclays.
24 Under the other agreement, these same assets are excluded
25 assets. They stay with the estate, are subject to the

1 authority of the trustee. Can you help the Court understand
2 how it could have before it, these two agreements?

3 A. The agreement between DTCC and Barclays was a separate
4 agreement. It wasn't an agreement in which Lehman was
5 involved. This was Barclays dealing with the assets which it
6 was acquiring.

7 Q. Does the clarification letter reflect any conscious effort
8 on the part of you or your law firm, to conform that agreement,
9 that draft agreement or that final agreement, with Barclays'
10 separate letter agreement with the DTCC?

11 A. I don't believe we saw the DTC letter.

12 Q. Are you aware of any effort on the part of Weil Gotshal to
13 conform the clarification letter to the DTCC letter?

14 A. Since we did not have the letter, I don't believe there
15 were any efforts to do that.

16 Q. Sir, you referred earlier in your testimony to the sale
17 hearing and also to the fact that the Court was told that there
18 was no cash being transferred to Barclays. And I believe the
19 sale hearing is at Movant's Exhibit 261. If I could invite
20 your attention, sir, to page 53 of that transcript.

21 A. Yes.

22 Q. That, sir, is where you partner, Ms. Fife, represented to
23 the Court that there's no cash being transferred to Barclays.
24 Is that correct?

25 A. Could you refer me to the line?

1 Q. I'm sorry. It's at the very bottom of the page, starting
2 at line 24.

3 A. Yes, I see the lines.

4 Q. And if you could further turn, sir, to page 242 of the
5 transcript? You might want to look just for reference or
6 context to page 241. In the middle of page 241 at line 14,
7 you'll see that you're addressing the Court in this passage.

8 A. I see I'm addressing the Court. I'm not quite sure what
9 it means, but go ahead.

10 Q. Well, I'm --

11 A. I don't know who the woman is.

12 Q. -- I won't delay you on that. I'll ask you, sir, to turn
13 to page 242, starting at line 13. And you'll see there, again,
14 and this time you represent to the Court, "Cash -- we're not
15 transferring any cash to Barclays. That's out of the
16 agreement."?

17 A. Yes.

18 Q. And the representations that you made and that Ms. Fife
19 made to the Court, that was entirely consistent with your
20 understanding of the transaction. Isn't that correct?

21 A. Yes. In referring to free cash, unencumbered cash.

22 Q. I believe you said, "we're not transferring any cash to
23 Barclays. That's out of the agreement." When you say free
24 cash, that's obviously cash, sir. But I understand what you
25 said to the Court was "we're not transferring any cash." Was

1 there some variety of cash that you were excluding from your
2 representation?

3 A. Yeah, there was margin cash associated with the customer's
4 account, and they were taking the customer's account. They
5 were taking the whole account. So if there was collateral cash
6 in that account, that cash would go with the customer's
7 account.

8 Q. So you weren't discussing customer property here, you were
9 talking about Lehman's own proprietary property?

10 A. Well, I may -- your use of the word "customer cash" --
11 collateral, margin payments. I'm not sure how you would
12 characterize that as whether it's Lehman cash or customer cash.
13 But as a general proposition, with the accounts being
14 transferred, everything relating to those accounts was being
15 transferred.

16 Q. So you certainly were not including customer cash when you
17 said "no cash is being transferred to Barclays"?

18 A. That's correct.

19 Q. You understood the customers deposited cash with Lehman.
20 And with the customer accounts, the cash that belonged to them
21 would also go?

22 A. That's correct.

23 Q. Lehman, on the other hand, had its own cash which it used
24 for a variety of purposes, did it not?

25 A. It had some cash, yes.

1 Q. Including, for example, the cash that was restricted in
2 the 15c3 account, correct?

3 A. That's correct. That was not available for use at any --
4 under any circumstances.

5 Q. And you represented to the Court that there was not any
6 cash that was being transferred to Barclays, correct?

7 A. In the context of our last two minutes, yes.

8 Q. And of course, that was of concern to you on the Sunday
9 night or the early Monday morning when you learned that
10 Barclays wanted not only 769 million in government securities,
11 but in addition, one billion dollars of restricted cash in the
12 customer reserve account, correct?

13 A. I think I testified to that.

14 Q. And that's what led to a heated argument, in which you
15 took the position that a representation had been made to the
16 Court that no cash was being transferred to Barclays, and you
17 therefore insisted that that one billion dollars in cash not be
18 transferred to Barclays from the restricted customer accounts?

19 A. That was one aspect or one branch of the debate, if you
20 want to call it that. The other being that that account was a
21 protected account and should not have been transferred. We
22 also, I might add, gave an admonition to Barclays that the
23 likelihood of the SEC ever releasing that account was slim to
24 none.

25 Q. You mentioned in your last answer, I believe -- or the

1 previous answer -- margins, sir. And you personally did not
2 have any discussions with anyone at Barclays about Lehman's
3 margin. Isn't that right, sir?

4 A. That's correct.

5 Q. And by Lehman's margin, you understand Lehman's cash, cash
6 equivalents and government securities that Lehman posted as
7 collateral with clearing corporations?

8 A. Correct.

9 Q. And indeed, you are not aware of anyone at your firm, the
10 Weil Gotshal law firm, who had any discussions with anyone at
11 Barclays concerning the question of Lehman's margins?

12 A. As far as I'm aware, that's correct.

13 Q. Thank you, sir.

14 MR. MAGUIRE: No further questions.

15 THE COURT: Mr. Schiller?

16 MR. SCHILLER: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. SCHILLER:

19 Q. Jonathan Schiller from Barclays, Mr. Miller.

20 A. Good afternoon.

21 MR. SCHILLER: I have a book, Your Honor, that I would
22 like to distribute, with the Court's permission.

23 THE COURT: That's fine.

24 THE WITNESS: Am I finished with this one? Mr.
25 Schiller, do I need this one anymore?

1 MR. SCHILLER: Would you just, please, leave it up
2 there? I may make reference to it. Thank you.

3 (Pause)

4 Q. I would like to begin, Mr. Miller, with tab 2 of the book
5 that I provided you, which would be the hearing transcript from
6 the September 19th hearing, which you described extensively
7 this morning. I would like to go back to what you advised
8 Judge Peck at page 60, lines 19 through 23, where you advised
9 the Court that, "The substance of this transaction is to
10 continue a business for the benefit of the general economy, the
11 employees, whose lives are at stake, and to fit a small piece
12 into the jigsaw puzzle of maintaining a stable economy." Do
13 you see that, sir?

14 A. Yes, I do.

15 Q. Were those benefits that you set forth there for the Court
16 realized?

17 A. I would say, in part. The problem that I'm having is the
18 stable economy. I have very fixed views about that, which I
19 don't think I should express, Your Honor.

20 THE COURT: There's no need to express those views
21 here.

22 A. But I would say generally, the transaction did accomplish
23 that in terms of the employees, in terms of the customers of
24 LBI. I think it was of enormous benefit to the nation and to
25 the city. And it accomplished what I think we set out to

1 accomplish. We saved a business that on Monday the 22nd, if
2 the transaction had not closed, would have been catastrophic,
3 with 10,000 people out of work, pandemonium, values lost, an
4 empty building in a real estate market that was crumbling. So
5 I am very proud of what happened.

6 Q. And the business that you saved, I believe you've always
7 characterized that in terms of the sale transaction as the
8 purchase of the North American business. Is that right?

9 A. North American capital markets business.

10 Q. And that business was sold, through the asset purchase
11 agreement. And that provided for Barclays to acquire all
12 assets used in connection with that business, except for those
13 which were explicitly excluded, correct?

14 A. That's correct.

15 Q. And when you proffered Mr. McDade's testimony to the Court
16 on the 19th, Mr. Miller, at page 98, lines 19 through 22, you
17 brought to the attention of Judge Peck that "McDade would
18 testify that the asset purchase agreement provides for the sale
19 of the North American broker-dealer business of LBI, which
20 includes banking and capital market business, in addition to
21 numerous other divisions," which you've just referenced again?

22 A. Yes, sir.

23 Q. Through that tumultuous week of September 15th through the
24 22nd, which you've described dramatically this morning again,
25 you never had what you would call an accurate Lehman balance

1 sheet. Is that correct?

2 A. That's a fair statement.

3 Q. And because there was no accurate Lehman balance sheet in
4 that chaotic period, there was significant uncertainty over the
5 value of Lehman's assets and liabilities that were being
6 transferred?

7 A. There was volatility in the values. There was a high
8 level of risk in the transaction, I think particularly from
9 Barclays' perspective. And that was one of the major elements
10 in this volatility about this transaction during the week and
11 concern about the decline in the values.

12 Q. And this uncertainty in values was one of the reasons that
13 the discussions ensued over valuation, that you've described
14 generally, correct?

15 MR. GAFFEY: Objection.

16 THE COURT: What's the objection?

17 MR. GAFFEY: Mr. Miller testified he wasn't involved
18 in those discussions.

19 THE COURT: Let me think about this. Objection is
20 sustained.

21 Q. You observed discussions, did you not, discussions you
22 were in and out of, where there was debate over the value of
23 the assets being transferred?

24 A. As I testified, I was in a number of conference rooms. I
25 wouldn't call it a debate. There were discussions between the

1 Lehman team and the Barclays team, as to the appropriate marks
2 or marks to market of various securities. As I said before, it
3 was a very long, laborious process. When you go CUSIP number
4 by CUSIP number, it could take a long time.

5 Q. Was it your impression that they were trying together to
6 get to appropriate marks for that period in the week?

7 A. That was my impression.

8 Q. Is it your testimony before the Court, Mr. Miller, that
9 this was not a balance sheet deal?

10 A. It was not a balance sheet deal, from my perspective, at
11 any time, nor from Mr. McDade's perspective.

12 Q. Why is that?

13 A. Because nobody really had a firm fix on the assets. This
14 was a distressed sale, when you get down to it, in an
15 extremely -- I mean, I've been at this for fifty years, and
16 I've never been in a situation like this. And what Mr. McDade
17 and his team were out to do, was to get the best deal they
18 could, the best deal that would preserve the employment
19 opportunities and the best deal to protect the customers of the
20 brokerage firm.

21 Q. In this environment, the APA that was presented to the
22 Court contained no representations or warranties regarding the
23 values of all of the assets and liabilities being acquired by
24 Barclays, correct?

25 A. That is correct.

1 Q. And the APA did not provide for a "true-up" regarding the
2 values of all of the assets and liabilities that were being
3 acquired, did it?

4 A. There was no provision for a true-up, and in the context
5 of what we were doing, having a true-up would have been, I
6 think, virtually impossible. And then if you had a true-up --
7 and let's assume that Lehman had a true-up, where would Lehman
8 get the assets to true up? I do recall that the Cleary
9 Gottlieb folks said there is no -- there will be no true-up,
10 and that's why I think there are no representations or
11 warranties.

12 Q. And in light of that impossibility that you've just
13 described --

14 A. Almost.

15 Q. -- Mr. Miller, you did not tell the Court on the 19th or
16 on the 17th, or represent to the Court, that this deal was
17 going to be in balance or roughly equivalent or a wash,
18 correct?

19 A. I did not -- I never used those expressions.

20 Q. Nor did you proffer through the testimony of Mr. McDade or
21 Barry Ridings that these assets and liabilities in this
22 transaction would be roughly equivalent or in balance or a
23 wash. Isn't that correct, sir?

24 MR. GAFFEY: Objection.

25 A. Well, I think --

1 THE COURT: What's the objection?

2 MR. GAFFEY: It's twofold, Your Honor. Mr. McDade's
3 testimony speaks for itself; and Mr. Miller's view of it is
4 eliciting an impermissible opinion.

5 THE COURT: Well, Mr. Miller is here as a fact
6 witness, but there's probably no one I can think of with
7 greater expertise in the subject matter. This is a hearing in
8 which what he represented to me at the time of the sale hearing
9 is an essential element of what's in dispute, and I'm going to
10 let him answer the question.

11 It's also a compound question, which I think is a
12 problem with the question as phrased, and would request that
13 the question be broken down so that it's actually a proper
14 question. I thought that was what the objection was going to
15 be. That's the objection I would have made to it.

16 MR. SCHILLER: Thank you, Judge.

17 Q. In light of the Court's objection to my question, let me
18 rephrase it. Mr. Miller on the 17th or the 19th, given the
19 impossibility that you mentioned a moment ago, did you tell the
20 Court or represent to the Court that the deal was going to
21 reflect roughly equivalent values of assets and liabilities?

22 A. Well, one, I think the transcript speaks -- the record
23 speaks for itself, and two, I don't believe I ever did that.

24 Q. Did you ever represent to the Court that this deal was
25 going to be a "wash"?

1 A. I did not.

2 Q. Did you say in words or substance to the Court on the 17th
3 or on the 19th, that assets and liabilities would "be in
4 balance"?

5 A. Since I didn't view the deal as that kind of a
6 transaction, I'm sure I never said that.

7 Q. You testified earlier that you spent a very long afternoon
8 and evening, late into the night, with Mr. Ridings and Mr.
9 McDade, preparing for this hearing before Judge Peck, given the
10 importance of that sale. Do you remember that?

11 A. Yes.

12 Q. And you were shown Movant's Exhibit 2, which is in their
13 book. I'm sorry to burden you. It's on the screen, I'm told,
14 so you don't have to go to the book. Thank you.

15 A. Yes.

16 Q. I believe it's your testimony that in the course of many
17 hours of preparation for this hearing and presenting to the
18 Court why it would offer fair value, among other things, for
19 this sale to be approved -- fair value to Lehman and its
20 creditors -- this document was not in the room or discussed.
21 Is that correct?

22 A. The document was not in the room. And I have no
23 recollection of discussing it.

24 Q. Thank you. Staying with the APA, Mr. Miller, which is tab
25 3 in your book that I gave you. If I might ask you to turn to

100

1 page 14, which is the -- at 3.1, the definition of
2 consideration.

3 A. Yes, sir.

4 Q. And consideration refers to the cash amount and the
5 assumption of assumed liabilities by purchaser --

6 A. Yes.

7 Q. -- and the cash amount was a definite amount. I believe
8 you've mentioned already, it was 250 million plus the appraised
9 value of the real estate?

10 A. That's correct.

11 Q. Which you describe as the building on Park Avenue and the
12 centers in New Jersey?

13 A. Seventh Avenue.

14 Q. Seventh Avenue, I'm sorry. The assumed liabilities
15 included some liabilities for which valuation estimates were
16 given -- the APA had some valuation estimates -- and some, as
17 you look at it, for which no valuation estimates were given,
18 correct?

19 A. That's correct.

20 Q. And the consideration section, 3.1, was freestanding, was
21 it not?

22 A. What do you mean by freestanding?

23 Q. It was an independent, unconnected term. It stood by
24 itself in terms of describing what would be paid by Barclays to
25 Lehman?

1 A. In paragraph 3.1?

2 Q. Yes.

3 A. Yes.

4 Q. And the 3.1 section of the APA, it doesn't define
5 consideration to be paid by Barclays as being based on "the
6 book value" of Long Positions, as that term is used in
7 subsection (d), does it?

8 A. That's correct.

9 Q. And similarly, the description of Long Positions as having
10 the book value as of the date hereof of approximately seventy
11 billion, does not describe the consideration being paid by
12 Barclays as set forth above?

13 A. That's correct.

14 Q. You've said in the past under oath, just to remind you,
15 that --

16 A. Remind me that I'm under oath --

17 Q. -- Barclays -- no, just to -- in your deposition --

18 A. Oh, okay.

19 Q. -- you testified that Barclays was not making the
20 acquisition for the purpose of taking a loss. Do you recall
21 that?

22 A. Yes.

23 Q. And there was nothing in the purchase agreement as
24 approved by this Court that limited Barclays in any way from
25 accounting for a gain, was there?

1 A. Not that I recall.

2 Q. Let me ask you to turn to tab 4 of the book that I
3 provided you, please.

4 MR. SCHILLER: Exhibit 419, for the record, Your
5 Honor.

6 A. Yes.

7 Q. And that is a letter to the examiner's team dated March
8 24, 2010.

9 A. That's what it is.

10 Q. And in the course of this letter to the examiner's team,
11 your partner Richard Davis writes that -- at paragraph 4, "In
12 response to your question as to why there wasn't a protection
13 of the balance between assets and liabilities, the assets were
14 going up, and while in some deals there might be a post-closing
15 true-up, no such provision was in this agreement"?

16 A. I think the paragraph says the assets were going down, not
17 up. I read the paragraph, yes.

18 Q. Yes. And it's accurate?

19 A. I believe it's accurate.

20 Q. And it's accurate in terms of your understanding of the
21 transaction, not what Mr. Roberts may have said to the
22 examiner?

23 A. That's correct.

24 Q. May I ask you to turn to the next page, please. And you
25 see a paragraph there. May I ask you to read it to yourself?

1 A. Yes, I have.

2 Q. Is it also correct, Mr. Miller, that while maintaining a
3 balance between the assets and the liabilities, as is written
4 here, might have been desirable, everyone understood that the
5 agreement did not require there to be such a balance? Do you
6 agree with that?

7 MR. GAFFEY: Objection, Your Honor. The witness is
8 not competent to testify to what everybody understood.

9 THE COURT: Well, I think that's true, although this
10 is cross examination. Although I think that Mr. Miller is not
11 hostile to either side here, he's just here as a source of
12 impartial information, as far as I can tell.

13 To the extent that it talks about what everybody knew
14 or everybody understood, it's probably a question that cannot
15 be answered --

16 MR. SCHILLER: Let me rephrase it, Your Honor.

17 THE COURT: -- but that's the language that's in the
18 letter.

19 MR. SCHILLER: Yes. Let me rephrase it.

20 Q. Maintaining -- is it correct, Mr. Miller, that maintaining
21 a balance between the assets and the liabilities might have
22 been desirable among the parties, but you, and in your
23 discussions reflected with Mr. McDade and Mr. Ridings,
24 understood that the agreement did not require that there be
25 such a balance?

1 A. The understanding and what Mr. McDade told me in the long
2 hours of preparing him -- prepping him for his examination,
3 that this was not a balance sheet transaction.

4 Q. Thank you. Let me turn to the subject of gain and day-one
5 gain, which has been presented to the Court already in this
6 trial. And let me ask you to turn to the -- actually I don't
7 need to burden you with the transcript, I don't think. Do you
8 recall that Barclays made a public announcement on or about
9 September 17, 2008, that it expected to have a multibillion
10 dollar gain -- accounting gain on day one of the acquisition,
11 that was two days before the sale hearing?

12 THE WITNESS: Do I get a right to object, Your Honor?

13 THE COURT: Regrettably as a witness, you don't. But
14 I think --

15 MR. SCHILLER: I'm happy to rephrase.

16 THE COURT: -- I think Mr. Miller doesn't like that
17 question.

18 MR. SCHILLER: So I gather.

19 Q. If Barclays announced on September 17th, two days before
20 the hearing, publicly, in an analysts call, and reported in
21 the press that it anticipated to have a multibillion dollar
22 accounting gain if the sale were approved, would that be
23 inconsistent with your understanding of the sale you presented
24 to Judge Peck?

25 A. Not inconsistent with my understanding. We live in an era

1 of financial engineering. And an accounting gain, which is
2 not, at least in my terms, in real money, would not have made
3 any difference.

4 Q. Would you also agree with me, it's not uncommon for
5 someone to buy assets in a bankruptcy process and make money on
6 that purchase?

7 A. In my experience, people who come to the bankruptcy court
8 to buy assets do not do it as eleemosynary institutions.

9 Q. Are --

10 A. They do it --

11 Q. -- I'm sorry.

12 A. -- in the hope that they're going to make money and that
13 it's going to be in some way accretive to them.

14 Q. And if they hope and announce that it may be accretive to
15 them, are they required to file such statements -- public
16 statements in the court, in your experience?

17 A. I don't know whether you're asking for a legal opinion or
18 just general advice. If your question is premised upon some
19 fiduciary duty, I would have to explore that and research it.
20 I don't think I'm really qualified to answer that question.

21 Q. If a purchase made, as Barclays, I represent to you, that
22 they did in a public announcement on the 17th of anticipated
23 accounting game in this proceeding, would you have brought it
24 to the Court's attention on the 19th?

25 A. I'm not quite sure I would have. I don't -- an accounting

1 game really did not go to the substance of the transaction and
2 I assume if they made a public announcement it was in the
3 public domain.

4 Q. Thank you. Now I may have covered this once before but I
5 would like to cover the subject again, if it's not duplicative.
6 And that is, that the APA provided to the Court had no
7 contractual limitations on the value of the purchased assets
8 that were being acquired by Barclays in the sale.

9 A. That's correct.

10 Q. Indeed the purchased assets were being acquired by
11 Barclays in the sale irrespective of what their values may have
12 been that week, correct?

13 A. Technically, yes.

14 Q. And because of that technicality in the contract there was
15 no valuation cap contractually for specific assets in the
16 transaction, correct?

17 A. That is correct.

18 Q. Indeed, between Lehman and Barclays, in their purchase
19 agreement, there was no valuation cap for all of the purchased
20 assets, correct?

21 A. In the agreement, that's correct.

22 Q. Is it fair to say that on September 19th, before this
23 Court when Lori Fife spoke, you, Mr. Miller, did not understand
24 the 47.4 billion dollars that she mentioned in terms of those
25 long position to be a valuation cap on the purchased assets

1 under the purchase agreement, correct?

2 A. It was just given for guidance as to the potential
3 dimensions of the transaction.

4 Q. And that guidance was given as to the long positions, the
5 hard assets which had been seventy billion on Tuesday and now
6 we're in freefall and you had a number 47.4, correct?

7 A. That's correct.

8 Q. I think it's important to review with the Court the fact
9 that the purchase agreement, which your firm and other lawyers
10 worked hard on with their clients, provided no valuation for
11 many of the purchased assets that were identified in the APA,
12 correct?

13 A. Barclays was buying the North American capital markets
14 business, whatever it was.

15 Q. And I hate to take up too much of your time and burden you
16 with this contract, but it is important in terms of what's been
17 said to this Court before you took the stand.

18 If I could have you turn back to the APA, which is again
19 tab 3 and look at pages 6 through 8 with me, Mr. Miller,
20 briefly?

21 A. Yes, sir.

22 Q. The APA doesn't provide valuations for many of the
23 nineteen categories of purchased assets that you see identified
24 there under the definition and through pages 6 and 8.

25 A. Yes, sir.

1 Q. It does provide a valuation of approximately seventy
2 billion for long positions and approximately a valuation of
3 1.34 retained cash. But it has no estimated valuations at all
4 for any of the other seventeen categories of purchased assets.
5 Do you see that and agree with that?

6 A. I do.

7 Q. Was Barclays entitled to each of those assets listed there
8 as clarified in the clarification letter, specifically
9 identified irrespective of whether there was a valuation
10 provided for it?

11 A. Pursuant to the approved APA, yes.

12 Q. And was Barclays entitled to any of these assets,
13 irrespective of any value that Barclays might ascribe to them
14 under its accounting on its balance sheet once it acquired the
15 business?

16 A. Under the APA as approved, yes. At least that's my
17 opinion.

18 Q. And subsection q, Mr. Miller, within that definition of
19 purchased assets --

20 A. Q?

21 Q. Yes, sir. On page 8. There's a reference there to
22 intangible assets.

23 A. Yes, sir.

24 Q. And the agreement provides that "Intangible assets
25 associated with or symbolized by the business, including

1 customer and supplier lists" are to transfer on the sale. Do
2 you see that?

3 A. Yes.

4 Q. Now was Barclay to acquire those intangible assets not
5 matter what value Barclays might attribute to those assets on
6 its balance sheet?

7 A. As you've pointed out, there's no valuation caps in the
8 asset purchase agreement or the clarification letter.

9 Q. And some of these assets that are discussed there may be
10 of value to Barclays in ongoing business on Monday but not to
11 Lehman, correct?

12 A. If the transaction did not close it would have no value.

13 Q. Indeed, the same is true for all the purchased assets --

14 A. My recollection --

15 Q. -- listed in the APA. I'm sorry, go ahead.

16 A. My recollection is that there was a problem with the
17 intellectual property and some of the intellectual property
18 belonged to another entity.

19 Q. All right.

20 A. And that was brought to the attention of the Court.

21 Q. Thank you. In terms of those elements of the purchased
22 assets for which there was no value, there were a number of
23 them, as I've taken you through, seventeen categories. Seats
24 on the New York Stock Exchange, for example, weren't valued in
25 this deal were they?

1 A. No.

2 Q. They'd be of value Monday morning, because you got this
3 deal done, to Barclays when the markets opened but they meant
4 nothing to Lehman, correct?

5 A. You have to go back to the concept of the deal. The
6 concept of the deal was the sale of a business, an ongoing
7 business.

8 Q. It's been brought up before Judge Peck, Mr. Miller, that
9 this process that you observed, of the parties discussing
10 valuation, trying to get to a correct valuation, was not
11 presented to Judge Peck adequately on the 19th. To the extent
12 that is alleged by these movants, do you agree with it?

13 A. No.

14 Q. May I address your attention, again, to the transcript of
15 the 19th. And I'd ask you to turn --

16 A. What's the number?

17 (Pause)

18 Q. It's tab 2 in the binder I placed before you.

19 A. Okay.

20 Q. And I draw your attention to page -- before I do that,
21 let's make sure I provided you with enough pages. Page 109.

22 A. I don't have 109.

23 Q. If you would turn to --

24 A. It's on the screen.

25 Q. Okay. Well, let's look at it on the screen. That's fine.

1 And in particular, questions put to Mr. McDade beginning at
2 line 5. He is asked:

3 "Q. Well, in the absence of a closing balance sheet having
4 been prepared, can you please describe for the Court how it is
5 that the debtor determined that fair value was being realized
6 for the sale of these assets?

7 "A. For the assets?

8 "Q. Yes.

9 "A. The individual assets on the balance sheet, the trading
10 inventory, was bottoms up. Meaning, individual line item
11 detail processed through all of our individual risk businesses
12 in coordination with a normal finance professionals who are
13 incorporated into the valuation process.

14 "Q. Did the debtors have any form of valuations of any of the
15 assets that are being transferred?

16 "A. Sorry?

17 "Q. Does Lehman have any valuations, internal valuations of
18 any of the assets being transferred?

19 "A. Absolutely. There are many complex security models
20 involved, many different models we used to evaluate those
21 securities.

22 "Q. And is it your testimony that a valuation was conducted
23 within Lehman for all the assets being transferred to Barclays,
24 when was that conducted?

25 "A. Portfolio moved during the week."

1 At the top of page 110.

2 "A. But that was conducted all last evening, all through and
3 up to the arrangement -- the agreement today."

4 Q. Does that testimony by Mr. McDade conveying to the Court
5 the process which you described briefly today?

6 A. There was a process of trying to establish the appropriate
7 evaluation for the securities that were going to be transferred
8 based on the mark-to-market basis. There was a general theme
9 that Lehman's marks were aggressive.

10 Q. Let me turn to the questions of comp and cure, if I will,
11 those assumed liabilities that you've been asked about. It's
12 your testimony that those figures on comp and cure that were
13 presented this morning were very contingent, is that right?

14 A. Yes. They were contingent figures. It was an estimate of
15 exposure.

16 Q. And these were rough estimates that were inherently
17 uncertain and made in good faith to the Court, were they not?

18 A. I would adopt the words good faith. I can't tell you they
19 were rough, you'd have to go to the person who calculated them.

20 Q. And the Court was told these were estimates of potential
21 exposures, correct?

22 A. It was subject to variables in terms of which contracts,
23 if any, were going to be assumed and there were many, many,
24 many contracts, whether there were defaults that had to be
25 cured, and that goes to the executory contracts and the

1 unexpired leases.

2 In terms of compensation we were talking about,
3 approximately 10,000 employees, what would Barclays -- if the
4 transaction closed, how many of those employees, ultimately,
5 would be retained by Barclays which would diminish the
6 exposure.

7 Q. And the Court was told, through the APA, what Barclays
8 might have to pay depending on how it conducted its business
9 upon closing rather than actual amount that Barclays would pay,
10 correct?

11 A. It was, as we just discussed, it was an estimate. It was
12 an exposure amount.

13 Q. And the 1.5 billion, with respect to what are called cure
14 payments, that was a maximum exposure, correct?

15 A. It was an estimate that was to take into account the -- if
16 all of the contracts or substantially all the contracts were
17 going to be assumed, what might have been required to cure any
18 defaults under those contracts.

19 Q. You've described how chaotic it was that week, haven't
20 you?

21 A. Yeah.

22 Q. And you've described the situation in Lehman itself upon
23 your arrival there, in terms of the people, their operations
24 and their systems being down; do you remember that?

25 A. Yes, I do.

1 Q. Was there -- and you described the melting iceberg which
2 you dramatically reviewed with the Court that important evening
3 of September 19th. It's 2010 now but that ice cube was melting
4 in September of 2008, wasn't it?

5 A. I would say with some speed.

6 Q. Was there time for an integration analysis for Barclays
7 and Lehman as in an ordinary merger, to sit down and see how
8 these business could be merged?

9 A. This was not an ordinary transaction in any sense of the
10 word.

11 Q. Was there any time --

12 A. Can I finish?

13 Q. I'm sorry; yes, sir.

14 A. This was, as I said before, the most hectic, difficult
15 transaction I've ever been involved in, different from any
16 financial crisis, maybe 10,000 more difficult than the Refco
17 case in terms of a transaction.

18 In the context that this was not peculiar to Lehman, we
19 were in an economy which was going through the floor and that's
20 why the federal government was actively involved.

21 Q. And there was precious little time to do a synergistic
22 review of what contracts would be assumed, if those contracts
23 could even be identified and located, correct?

24 A. I believe that to be correct.

25 Q. There was no way to know what the number for cure would be

1 in the amount of time available to negotiate the sale that
2 week.

3 A. My recollection is, there were thousands of contracts that
4 had to be reviewed. We want to set up a process that would not
5 be a tremendous burden on the court, where parties would, in
6 effect, negotiate whether the contract should be assumed,
7 cured, defaults waved, etcetera, and there was a process that
8 was being set up, almost like an EDR process.

9 Q. No one knew what contracts would be assumed?

10 A. On the 19th and over the weekend certainly not.

11 Q. And no one knew, on the 19th or over the weekend, whether
12 Barclays would get a bargain from the vendor on any of those
13 contracts?

14 A. That's correct.

15 Q. So there was, it's fair to say, a wide range of what
16 Barclays would choose to do and expend between some number and
17 1.5 billion, correct?

18 A. Could be.

19 Q. Okay. You were not concerned, I think you've indicated
20 already, with what Barclays ultimate accounting treatment for
21 cure payments would be, is that right?

22 A. I didn't have any major concern about that. The -- how
23 you treat things for accounting purpose always mystified me.

24 Q. In fact, you generally considered Barclays' accounting
25 irrelevant to what you were doing with your colleagues that

1 week?

2 A. I don't think accounting for negative good will was a
3 particularly important thing.

4 Q. And with respect to the two billion dollar estimate of
5 exposure for both bonus and severance, which you addressed
6 briefly, that number could be known with precision either
7 because it wasn't known how many employees would accept at
8 Barclays or how many would terminate and for those accepted how
9 long they'd be there.

10 A. I think I testified to that.

11 Q. You were asked earlier about discussion of whether to take
12 the clarification letter back to court on the evening before
13 the closing was completed, Sunday night, do you remember that?
14 Subject earlier in the --

15 A. Over the weekend there was a discussion about that.

16 Q. Yes, over the weekend.

17 A. Yes.

18 Q. Now in April of 2010 our economy is a different place than
19 it was, as you described the economy in the circumstances of
20 Lehman in September 2008, correct?

21 A. Is the economy different now?

22 Q. Yes.

23 A. Then it was back in September of 2008?

24 Q. It's much improved, isn't it?

25 A. I guess you can say so. I think the president might say

1 so.

2 Q. On April 9th, movants said to this Court that it was an
3 egregious mistake for Weil Gotshal and other lawyers involved
4 in Lehman, not to bring the clarification letter back to the
5 Court.

6 MR. GAFFEY: Misquotes the papers, Your Honor

7 MR. SCHILLER: "Egregious mistake" is in the
8 transcript, Judge.

9 MR. GAFFEY: Those two words are in it but not as Mr.
10 Schiller just read it, Your Honor

11 THE COURT: Right. It's a misleading question then.
12 Why don't you rephrase it?

13 Q. If my friend referred to the decision not to bring the
14 clarification letter back as a mistake what is your view of
15 that?

16 A. The issues was whether there was any material change in
17 the basic transaction which had been presented to the Court.
18 And after discussion a number of people including, I think, the
19 creditors' committee representatives who where there the
20 conclusion was there was no material change that required going
21 back to the Court.

22 In fact, as late as, I think, two months after the closing
23 in a meeting with the attorneys for the creditors' committee
24 the question was raised again and the issue, which was
25 discussed, I think his name Matthew Barr, a partner of Milbank,

1 do you want to rethink that and we said that we are perfectly
2 comfortable that there was no material change and Mr. Barr said
3 fine, as far as the committee's concerned, unless they see the
4 variance of two billion dollars they won't say anything --
5 anything further, I should say.

6 Q. Do you recall a discussion with Mr. Despins on the --

7 A. Mr. who?

8 Q. I probably didn't pronounce his name correctly, for the
9 creditors' committee.

10 A. Mr. who? Oh.

11 Q. The lawyer.

12 A. Luc Despins?

13 Q. Yes.

14 A. Yeah. Mr. Despins was at the closing with the national
15 advisors for the creditors committee. I think, as I testified
16 in my deposition, about 3, 4 a.m. Monday morning they decided
17 to leave and that was after the discussion about the 15c3-3
18 account. And it looked as if all of the issues relating to the
19 closing had been reconciled and agreed to about that time. And
20 they decided that they had been there all weekend, that they
21 could leave. And we had a short discussion and basically my
22 recollection is that, I think, Saul Burian said if it's okay
23 with you guys, it's okay with us and they left. They were not
24 there for the final crisis at 6 a.m.

25 Q. Mr. Miller, let me ask you briefly about the repo

1 collateral. I believe it's your testimony that what was the
2 fed repo -- what Barclays stepped into the shoes of, as of the
3 closing, was to come to Barclays. That is, the loans paid in
4 that collateral eventually was to transfer Barclays?

5 A. My understanding was that Barclays was stepping into the
6 shoes of the federal reserve bank by paying off the repo loan
7 and that the securities, which were securing that loan, were
8 going to be transferred, delivered, to Barclays whether it was
9 through JPM or how they were going to do it, I was not involved
10 with the mechanics.

11 Q. Do you recall appearing before the Court in December 2008
12 in connection with what's called the JPM settlement by some in
13 December?

14 A. Yes.

15 Q. Do you recall Ms. Leventhal, from the fed, offering her
16 evidence through declaration and appearing before the Court
17 that day?

18 A. I do.

19 Q. And do you recall that she described the repo securities,
20 as listed at a value of 49.7 billion and a loan of forty-five
21 billion as being consistent with the repo between Barclays and
22 Lehman after Barclays stepped into the shoes?

23 A. I do not specifically remember the figures. I think the
24 record would speak for itself. I remember the December hearing
25 to approve the settlement, which I think was triangular, JPM,

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1 Pacific Estate and Barclays. And as I recall, both on behalf
2 of Lehman and on behalf of the creditors' committee there were
3 no objections to the settlement but there was a complete
4 reservation of rights.

5 Q. Do you recall, also, that you were asking this Court to
6 complete the purchase agreement, including the clarification
7 letter, by providing to Barclays the values of assets it was
8 entitled to?

9 A. I think that's a compound -- I don't understand that
10 question.

11 Q. The clarification letter was integrated into the purchase
12 agreement, wasn't it?

13 A. That's correct.

14 MR. GAFFEY: Objection, Your Honor.

15 Q. And the repo collateral --

16 THE COURT: One second. Let's deal with the
17 objection.

18 MR. GAFFEY: There's no foundation for the
19 clarification letter -- was integrated into the purchase
20 agreement. It's Mr. Schiller's characterization. We haven't
21 had any evidence that establishes --

22 THE COURT: The objection is sustained. Rephrase the
23 question, please.

24 Q. Was the clarification letter a part of the sale order
25 approved by this Court, late at night, early in the morning of

1 September 20th?

2 A. The clarification was not a part -- was not a part of the
3 sale order that was signed on September 19th, I think is the
4 official date. The clarification letter was filed on Monday,
5 the 22nd, is my recollection.

6 Q. The clarification letter was referenced in the first
7 paragraph of the sale order, wasn't it?

8 A. I don't recall.

9 Q. Well, let me get that for you and before --

10 THE COURT: Mr. Schiller, before you go there.

11 MR. SCHILLER: Sure.

12 THE COURT: It's now ten to 1. I've been conscious of
13 the fact that Mr. Miller has been here all morning and now into
14 the early afternoon. Just if you could give me an estimate as
15 to whether or not you think you're going to be concluding with
16 your examination promptly we'll stay with this and then find
17 out how much redirect, if any, there's going to be and make a
18 judgment about a lunch break.

19 If you think you're going to be a while and as a
20 result you think Mr. Miller is going to have to be called back
21 after lunch I'll take the break now.

22 MR. SCHILLER: I don't think I will -- I may have
23 fifteen or twenty more minutes, Judge.

24 THE COURT: Okay. If it's twenty minutes that's 1:10.
25 Let me just ask if there is to be any redirect?

1 MR. GAFFEY: If there's any it's no more than ten
2 minutes, Your Honor.

3 THE COURT: All right. Then I'm going to ask the
4 witness for his personal preference. Would you like to stay
5 and conclude this or would you be happier refreshing yourself
6 and coming back at 2:00?

7 THE WITNESS: I'd be delighted to stay and conclude
8 it, Your Honor.

9 THE COURT: Fine. Let's get this over with then. And
10 in reference to the questions that you're about to ask Mr.
11 Miller about the content of the sale order, I certainly don't
12 intend to intrude upon your manner of examination but since
13 that's my order and it says what it says, even though it was
14 drafted by others, I don't know what you gain by having Mr.
15 Miller confirm what's already in the public record.

16 The legal consequence of that is something ultimately
17 to be determined here and Mr. Miller's not in the position to
18 add anything of value to the finder of fact with respect to
19 that question.

20 MR. SCHILLER: All right.

21 Q. Let me just ask you one question about Exhibit 16 in the
22 book that I gave you. In the first paragraph of the Court's
23 sale order, if you go four lines from the bottom you see a
24 reference to that letter agreement clarifying and supplementing
25 the asset purchase agreement dated September 20th, 2008?

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1 A. Yes.

2 Q. Is that a reference to the clarification letter?

3 (Pause)

4 A. Yes.

5 Q. Thank you. And the clarification letter identified the
6 assets in the business that Barclays was acquiring, did it not?

7 A. It says what it says.

8 Q. Can we go to the clarification letter at tab 12, please,
9 of the binder I put in front of you?

10 A. Ten?

11 Q. Twelve, sir.

12 A. Twelve. Let's see. Yes.

13 Q. And I bundled a question about the repurchase agreement a
14 few moments ago and perhaps with the help of this letter I can
15 straighten that out.

16 If you look to paragraph numbered 1(a)(ii) at the bottom
17 of the page.

18 A. Uh-huh.

19 Q. It references the purchased assets. And it says, with
20 respect to clauses A, D and E of the definition of purchased
21 assets in the original agreement, instead of the items referred
22 to in such clauses, "A. The securities instead of what's
23 referred to in such clauses, the following will replace them:
24 A, the securities owned by LBI and transferred to the purchaser
25 under the Barclays' repurchase agreement as specified in

1 Schedule A, previously delivered by the seller and accepted by
2 the purchaser." Do you see that?

3 A. Yes.

4 Q. And do you understand that that is a reference to the repo
5 that began with Barclays standing in the shoes of the fed and
6 entering that REPO with Lehman?

7 A. I believe that's correct.

8 Q. Also, if you continue in that paragraph you'll see it at
9 subparagraph (b) the writer makes reference to the fact that
10 Barclays will receive such securities and other assets held in
11 LBI's clearance box at the time of the closing, which the close
12 of business on September 21, 2008 were as specified on Schedule
13 B previously delivered, you see that?

14 A. What paragraph is that?

15 Q. I'm sorry, it's still purchased assets, it's still A, and
16 the bottom of the page of page 1. I'm still on page 1 and that
17 full paragraph.

18 A. Okay.

19 Q. And I was reading to you after the reference to the
20 Barclays' repurchase agreement the very next section, Section
21 B, which makes reference to the fact that, "Such securities and
22 other assets held in LBI's clearance boxes shall be conveyed to
23 Barclays at the time of the closing," you see that?

24 A. I see the language, yes.

25 Q. And was that your understanding during the closing that

1 Barclays would be receiving the assets that were held in LBI's
2 clearance boxes?

3 A. Whatever the agreements provided for.

4 Q. So Barclays is to receive what the clarification letter
5 provides for?

6 A. It became an operative document. At the time I don't
7 believe anybody was -- really knew what was in the clearance
8 boxes.

9 MR. SCHILLER: One moment, Your Honor?

10 THE COURT: All right.

11 (Pause)

12 Q. You were asked earlier about the DTCC discussions with
13 Barclays over that weekend to try to resolve the issues, so
14 that Barclays could operate effectively on Monday. And there
15 is reference to the DTCC agreement with Barclays at page 3,
16 paragraph D at the top of the page, do you see that?

17 A. Yes, I do.

18 MR. SCHILLER: Thank you very much, Mr. Miller. Thank
19 you, Your Honor.

THE COURT: Is there any redirect?

21 MR. GAFFEY: Much less than ten minutes, Your Honor,
22 yes. I have three or four questions.

23 Can we have Exhibit 2 on the screen, please?

24 THE WITNESS: Is that your Exhibit 2 or his Exhibit 2?

25 MR. GAFFEY: My Exhibit 2. We can just use the

1 screen.

2 REDIRECT EXAMINATION

3 BY MR. GAFFEY:

4 Q. Mr. Miller, I'll be very quick. In your discussions with
5 Mr. McDade that Mr. Schiller asked you about, did Mr. McDade
6 ever tell you that he understood this -- this document to bear
7 a significant relation to the deal?

8 A. No, he did not.

9 Q. Did Mr. McDade ever tell you that he understood this
10 document to be a summation of the assets and liabilities to be
11 transferred in the deal?

12 A. No, he did not.

13 Q. And in your discussions with Mr. McDade, did he at any
14 point tell you that in his view the deal reflected or should
15 have reflected an equivalent exchange of assets and
16 liabilities, a wash?

17 A. No, he did not.

18 Q. And did Mr. McDade ever tell you that he understood that
19 if there were a first day gain for Barclays it would be
20 inconsistent with his view of the deal?

21 A. Mr. McDade and I spent six to eight hours on Thursday and
22 he never used the word wash. He never referred to this as a
23 transaction which was a balance sheet transaction. His only
24 reference was we're trying to make the best deal we can make to
25 preserve a business and save jobs and try to help the economy.

1 Q. Apart from the particular word wash, sir, just so --

2 A. I thought you use the words washers now.

3 Q. It was one of them. Did Mr. McDade tell you in sum or
4 substance that it was his understanding that this deal was
5 structured to be an equivalent exchange of assets and
6 liabilities?

7 A. Mr. McDade never said that to me.

8 MR. GAFFEY: Thank you. I have nothing further, Your
9 Honor.

10 THE COURT: All right.

11 MR. WERDER: I have about four or five questions, Your
12 Honor.

13 THE COURT: That's a surprise considering you didn't
14 ask any before. But please proceed.

15 MR. WERDER: They do relate to the cross-examination.

16 THE COURT: Fine.

17 RECROSS-EXAMINATION

18 BY MR. WERDER:

19 Q. Good afternoon now, Mr. Miller. Rick Werder from Quinn
20 Emmanuel, one of the committee's counsel.

21 A. Good afternoon.

22 Q. Mr. Schiller asked you some questions about the list of
23 purchased assets in the APA, do you recall that?

24 A. Yes, I do.

25 Q. And he pointed out to you that for some number of the

1 listed purchase assets there was no value assigned to them, and
2 that is -- that is a true statement, is it not?

3 A. That's correct.

4 Q. Okay. But there was a value assigned to what were defined
5 as the long positions in the APA, correct?

6 A. Yes.

7 Q. And that value was stated to be approximately seventy
8 billion dollars based upon Lehman's book values, correct?

9 A. The figure seventy billion dollars is in the agreement.

10 Q. Okay. And in addition to the discussion of assets in the
11 APA there was also a value assigned to what was defined as
12 short positions, was there not?

13 A. I don't have a present recollection.

14 Q. Let me ask you if you could turn to tab 3 of Mr.
15 Schiller's book.

16 A. Yes.

17 Q. Which is the APA.

18 MR. WERDER: And for the record, his version of it is
19 identified as BCI Exhibit Number 1.

20 Q. And I'll ask you to turn your attention to page 12,
21 please. And I want to direct you, Mr. Miller, if I could,
22 specifically to Section 2.3(i), which is the third paragraph on
23 the top of page 12.

24 A. I got it, yes.

25 Q. And that references a defined term "short positions," does

1 it not?

2 A. It does.

3 Q. And it indicates that those short positions which Lehman
4 was going to take over included -- had a book value of
5 approximately sixty-nine billion, correct?

6 A. That's what it says.

7 Q. And so a reader of the APA would infer, would he not, that
8 the long positions and the short positions described as to be
9 transferred pursuant to the APA, but roughly imbalanced?

10 MR. SCHILLER: Objection, Your Honor.

11 THE COURT: Sustained.

12 MR. WERDER: No further questions.

13 THE COURT: Anything more?

14 MR. GAFFEY: No questions, Your Honor.

15 THE COURT: Mr. Miller, you're excused. And thank you
16 for your time.

17 THE WITNESS: Thank you, sir.

18 THE COURT: We're adjourned until 2:00.

19 MR. GAFFEY: Thank you, Your Honor.

20 (Recess from 1:01 p.m. until 2:10 p.m.)

21 THE COURT: Good afternoon.

22 MR. GAFFEY: May I proceed, Your Honor.

23 THE COURT: More books?

24 MR. GAFFEY: I have one for the Court, I have one for
25 the witness, all others are I think -- Mr. Schiller has his.

1 THE COURT: Good.

2 MR. GAFFEY: And we call Martin Kelly, Your Honor.

3 THE COURT: And you may approach.

4 MR. GAFFEY: Thank you.

5 THE COURT: Thank you. Mr. Kelly, before sitting down
6 could you raise your right hand, please.

7 (Witness duly sworn)

8 THE COURT: Be seated, please.

9 DIRECT EXAMINATION

10 BY MR. GAFFEY:

11 Q. Good afternoon, Mr. Kelly.

12 A. Good afternoon.

13 Q. I'm Robert Gaffey from Jones Day, special counsel to the
14 debtor. We met before, sir?

15 A. Yes. I recall that.

16 Q. At your deposition?

17 A. I recall that, yes.

18 Q. And not any time since then, correct?

19 A. That's correct.

20 Q. How are you currently employed, Mr. Kelly?

21 A. I remain employed as the Americas CFO at Barclays Capital.

22 Q. And how long have you been employed by Barclays Capital?

23 A. Since October of 2008.

24 Q. And, in addition, you've held the title of chief financial
25 officer in the Americas at Barclays, is that correct?

1 A. That is the position I hold, yes.

2 Q. And Barclays' head of finance for structured capital
3 markets, is that correct?

4 A. I retain that, although I'm in the process of
5 transitioning that to someone else.

6 Q. And have you held any other titles at Barclays since
7 you've been employed there?

8 A. I have. When I first moved to Barclays I was the
9 financial controller for Barclays Capital based in London. And
10 I also held a position known as the Americas head of financial
11 decisions support, which was based here.

12 Q. Do the titles you currently hold constitute promotions?

13 A. I've remained reporting to the same individual, Patrick
14 Clackson, throughout that entire period. But I think that the
15 responsibility of the CFO role is larger than the initial
16 responsibility.

17 Q. And when were you first -- well, prior to your employment
18 by Barclays where'd you work?

19 A. I was employed by Lehman Brothers.

20 Q. And you were employed -- when were you employed by Lehman
21 Brothers?

22 A. I started employment at Lehman Brothers in August of 2000.
23 And I was employed by Lehman until I moved up to Barclays.
24 There was a period of time between May of 2005 and January of
25 2006 when I was not employed by Lehman.

1 Q. And would you describe for us briefly the sequence of jobs
2 you had when you were employed by Lehman?

3 A. Sure. I joined Lehman in the fixed income division. And
4 I was employed in a sales capacity, a client-facing role which
5 was a structuring role in nature. And it drew upon my
6 accounting background. But the role was centered around
7 transaction development for clients of the firm.

8 Q. And in and round September of 2008 you were Lehman's
9 global financial controller, is that correct?

10 A. That's correct, yep.

11 Q. And as global financial controller at Lehman your duties
12 included financial and regulatory reporting of the firm's
13 finances and results, is that correct?

14 A. That's correct, yes.

15 Q. And you reported directly to Ian Lowitt?

16 A. At that time, yes.

17 Q. And Mr. Lowitt was the firm's chief financial officer at
18 that time, is that correct?

19 A. That's correct.

20 Q. And when you were a global financial controller, you had
21 people that reported directly to you, is that correct?

22 A. That's correct.

23 Q. And they included Brian Traversy (sic), yes?

24 A. Ryan Travesary (ph.) was one.

25 Q. Okay. And Marie Stewart?

1 A. Yes, she was another.

2 Q. And was Kristy Juan (ph.) one?

3 A. For a -- not for that entire period, but for the latter
4 part of that nine-month period.

5 Q. But that would include September of 2008, yes?

6 A. Yes, it did.

7 Q. Now, your compensation from Lehman in 2007, sir, was
8 approximately 1.1 million dollars, is that right?

9 A. That's correct.

10 Q. And that was made up of a base salary as well as cash and
11 stock bonus components?

12 A. That's correct.

13 Q. And the base salary was about 200,000 dollars?

14 A. That's correct.

15 Q. The stock component was approximately 350,000?

16 A. Approximately.

17 Q. And the cash component was approximately 550,000, is that
18 right?

19 A. Approximately, yes.

20 Q. And the cash component, the cash component of your bonus,
21 sir, was that a year-end bonus?

22 A. Well, bonuses were paid once each year.

23 Q. At the end of each year?

24 A. Well, they'll pay it I think in January of the year
25 following.

1 Q. The beginning of the next?

2 A. That's correct.

3 Q. Now, at the time of the sales transaction that's brought
4 us here today, sir, you expected that your 2008 compensation
5 from Lehman would be about two million dollars, is that right?

6 A. That's correct. That was based on a conversation that I
7 had had with my manager at the time I moved into that position.

8 Q. In 2008 your base salary was still in the roughly 200,000
9 dollar range, correct?

10 A. That's correct.

11 Q. The point being most of your compensation consisted of the
12 bonus component, yes?

13 A. It did, as is customary.

14 Q. Now, obviously, sir, you recall the Lehman bankruptcy in
15 September of 2008, is that right?

16 A. Yes, I do.

17 Q. And you recall the significant troubles of the company in
18 the weeks and the months leading up to the bankruptcy, is that
19 correct?

20 A. Yes, I do.

21 Q. Those troubles occupied a significant portion of your
22 time, did they?

23 A. They did, yes.

24 Q. And in the time leading up to that bankruptcy filing you
25 had concerns for your own continued employment prospects, is

1 that right?

2 A. I'm not sure what you mean by that.

3 Q. Are you aware if the company went bankrupt that you'd lose
4 your job?

5 A. I never thought the company would go bankruptcy and sell
6 off the day we filed.

7 Q. Well, at the time of the bankruptcy do you recall learning
8 about the bankruptcy filing?

9 A. Yes, I was there at the time.

10 Q. And that was on September 15th of 2008, is that right?

11 A. Yeah, I think it was late on the Sunday and the filing
12 occurred early on the Monday morning.

13 Q. Right. And when you learned about the bankruptcy filing
14 you had concerns for your own continued employment, is that
15 right?

16 A. I didn't think about it, actually. I was exhausted, I
17 knew that there'd be a lot of work to do, I would not
18 characterize it as saying I had concerns for my employment.

19 Q. Well, was it a fact, sir, that employees of Lehman in your
20 view were distraught at the time, because of the bankruptcy
21 filing?

22 A. Some were. Yeah, I think people were -- people were
23 exhausted. People were emotionally and physically tired.

24 Q. And you were in the same state yourself?

25 A. To an extent. I think I was certainly exhausted.

1 Q. Now, at or around the time of the bankruptcy you did work
2 in connection with the negotiations with Barclays concerning a
3 possible acquisition of Lehman, is that correct?

4 A. I was not a negotiator, but I was present as negotiations
5 were occurring.

6 Q. Okay. Well, you were involved in the work around the
7 negotiations, you weren't just a witness to them, right, sir?

8 A. I just want to be careful how I answer that, because it
9 depends how -- what you mean by involved. I was there, the
10 negotiations were happening on the thirty-second floor of the
11 building, I was there. I was involved around them. But I
12 wasn't negotiating.

13 Q. When you say you weren't negotiating, you mean to say,
14 sir, you were not at the table making offers, hearing offers,
15 doing the horse trading, right?

16 A. I'd characterize it as I was not making decisions around
17 what was being sold or assets or liabilities being assumed, or
18 the values associated with it.

19 Q. You were supplying information to the people who were?

20 A. Sure, I was part of a team. There was a team of people
21 that was working on the transaction. And I was -- I was
22 supplying information to various parties that day and that
23 night.

24 Q. Well, in the course of the work that you were doing in
25 connection with the transaction, you had contact with senior

1 Barclays negotiators, is that right?

2 A. I'm not sure I did then or even do now understand who was
3 negotiating for Barclays. I had had involvement with a
4 Barclays' team at the end of the prior week when they were
5 looking at acquiring all of Lehman. And I was helping them and
6 helping coordinate due diligence efforts that they were
7 undertaking. I was working with a similar group of people. I
8 don't know -- I don't know if that group was negotiating or
9 doing things similar to what I was doing in terms of, you know,
10 collecting information.

11 Q. Well, in the period after the bankruptcy when negotiations
12 were taking place -- let me pinpoint that a bit more. Is it
13 your understanding, sir, that negotiations took place overnight
14 from Monday the 15th into the early morning of the 16th when an
15 agreement in principal was reached?

16 A. I think I know that now. At the time I was no aware that
17 there was a possibility of a transaction with Barclays until I
18 woke up on the Monday morning and came into the office. So at
19 that time that's when I became aware of it. I think I've since
20 heard that it may have started the night before.

21 MR. GAFFEY: For a bit of clarity, I'm going to ask
22 that we -- do we have a calendar that we can put up?

23 Q. This is a calendar for September of 2008, Mr. Kelly.

24 On Monday morning, the 15th, you learned that there was
25 the possibility of a transaction with Barclays, is that right?

1 A. That's my recollection, yes.

2 Q. And you learned that from your superior, Ian Lowitt, the
3 chief financial officer, correct?

4 A. I think it was from Ian.

5 Q. Okay. And you came into work that Monday morning and did
6 some work in connection with the negotiations that had started
7 on the 15th, is that correct?

8 A. Well, I think I came into work not really expecting what
9 I'd be doing. I'd been there until we filed the bankruptcy
10 filing early that day.

11 Q. My question goes more to what you did, sir, not what you
12 expected. When you got there on the Monday, did you start
13 doing work in connection with the transaction?

14 A. Yeah. I'm just trying to provide some context because I
15 think it changed pretty quickly. I came in knowing that it
16 would be a hellish day; there'd be a lot to do. There wasn't
17 really a road map or planning around what that was. And I'm
18 not sure if I found out about the potential transaction with
19 Barclays as soon as I walked in the door that morning, but
20 sometime that morning I became aware of that.

21 Q. And you began to do some of your work around the
22 transaction, correct?

23 A. Well, I think the initial step was that there was an
24 expectation that a team would arrive from Barclays. And I
25 think I recall that there was an expectation or desire to get a

1 transaction done by that night. And so we started to gear up
2 for what would be a lot of information requests from the
3 Barclays side, and presumably from our own side.

4 Q. So you spent some time on the 15th gearing up, and then at
5 some point on the 15th you started doing stuff, right?

6 A. My recollection is the team arrived sometime in the
7 afternoon.

8 Q. Okay.

9 A. And it converged on the thirty-second floor.

10 Q. And the team being the Barclays' team?

11 A. Correct, the Barclays' team and different advisors; law
12 firms and bankers.

13 Q. And on that day, on the 15th of September, did you have
14 any communications with Archie Cox from Barclays?

15 A. No, I don't believe so.

16 Q. And did you have any communications with Patrick Clarkson
17 from Barclays?

18 A. Yes, I did.

19 Q. Okay. And that's on the 15th?

20 A. Yes, that's on the 15th.

21 Q. Okay. Did you have any communications on the 15th with
22 Mr. Richard Richie?

23 A. No. I believe it was several days later before I met
24 Rich.

25 Q. And you spoke to your boss, Mr. Lowitt, about the

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1 negotiations as well?

2 A. Well, yes, we were working together on a variety of things
3 around the transaction, yeah.

4 Q. Now, did there come a time when Mr. Clackson invited you
5 to join the team at Barclays?

6 A. I don't have a precise recollection of when. I do know I
7 received a contract in writing from Barclays on Tuesday, the
8 23rd. I think I may have had a quick conversation with Patrick
9 very shortly before that. And I'm guessing, but my best guess
10 would be, on the Monday, the 22nd.

11 Q. Are you certain, sir, you didn't have that -- it's not
12 possible you had that conversation during the latter part of
13 the week of the 15th?

14 A. I'm virtually certain that it did not happen until or
15 after the 22nd.

16 Q. Okay. Do you have a good memory of that happening on or
17 after the 22nd?

18 A. No. As I explained I can't precisely pinpoint it. It
19 was -- I seem to recall it was a phone call, not a meeting.
20 And I seem to remember it was a very quick conversation along
21 the lines of, you know, we'd like you to join the team.

22 Q. Is it at least within the realm of your memory, sir, that
23 you were approached about the possibility of employment at
24 Barclays either late in the week of the 15th or early in the
25 week of the 22nd?

1 A. The first indication I had of an employment opportunity at
2 Barclays came through Ian Lowitt. And, again, I'm not certain
3 as to the date. My recollection is that it occurred very soon
4 before I got the contract. So, again, I'm guessing but I think
5 it was Monday the 22nd. It's possible that it happened on the
6 prior Friday, the 19th. I don't think that was the case,
7 however.

8 Q. And you had conversations before that point with Mr.
9 Lowitt, about going to Barclays?

10 A. No, sorry, that was the conversation with Mr. Lowitt.

11 Q. Did Mr. Lowitt approach you about the possibility of
12 employment at Barclays?

13 A. He called me, yeah.

14 Q. Did he offer you employment at Barclays?

15 A. No. He said something like, you know, the Barclays team
16 have gotten to know you through the due diligence. And they'd
17 like to find a position for you. It wasn't any more specific
18 than that in terms of role. And he wasn't offering.

19 Q. So during the week of the 15th, the earlier or late in
20 that week, you had an indication that there would be a spot for
21 you at Barclays, is that right?

22 A. No, I didn't say that. I said my best recollection is
23 that the initial conversation with Ian, and that was the
24 initial conversation around employment, occurred on the 22nd.
25 It's possible that it occurred on the 19th, on the Friday. I

1 did not -- it was a conversation along the lines of they'd like
2 to find a role for you. It was nothing more committal than
3 that.

4 Q. Do you recall the first time you spoke to Mr. Clackson
5 about joining the team at Barclays?

6 A. Yeah. Well, as I said I think I had a call with Patrick
7 before I received the contract, but I'm not certain about that.
8 I think I did, and I think it was on the 22nd. I'm virtually
9 certain it didn't happen before that day. I then had a
10 subsequent conversation with Patrick around a potential role
11 with more clarity. But that was not until a week or so into
12 October.

13 Q. Mr. Kelly, do you recall putting in a declaration in
14 opposition to the Rule 60 motions that are the subject to this
15 hearing?

16 A. Yes, I do.

17 MR. GAFFEY: Your Honor, may I approach?

18 THE COURT: Yes. Thank you.

19 Q. Mr. Kelly, I put before you what has been marked by
20 Barclays' counsel as BCI Exhibit 362. And that's a copy of the
21 declaration you put in with Barclays' papers. And I would
22 direct your attention, sir, to paragraph 8.

23 MR. SCHILLER: Your Honor, may I ask a question of
24 counsel?

25 THE COURT: You --

1 MR. SCHILLER: This document appears to have a word
2 circled. Is this part of the original document?

3 MR. GAFFEY: No, it's not, Your Honor. That's mine --

4 MR. SCHILLER: I apologize. Is this my copy? It says
5 involved and it's circled. I don't know if that's part of the
6 original. I just raise it now as a question. It doesn't look
7 like the exhibit.

8 MR. GAFFEY: Your Honor, it's an office note from my
9 side of the aisle. It was given to us clean. So --

10 THE COURT: Do you have a problem with the use of the
11 document?

12 MR. SCHILLER: Absolutely not.

13 THE COURT: Fine.

14 MR. GAFFEY: Thank you.

15 THE COURT: I think all we've done is demonstrate that
16 the circling of that word occurred at Jones Day. It didn't
17 occur elsewhere.

18 MR. GAFFEY: That's right, Your Honor.

19 THE COURT: Fine.

20 BY MR. GAFFEY:

21 Q. Now, in your declaration, Mr. Kelly, in paragraph 8, and
22 I'm reading from the sentence on page 3, you say -- well, in
23 paragraph 8 you say, "I believe at some point during the week
24 of September 15th I was approach by Alvarez & Marsal North
25 America LLC, the restructuring advisor retained by the LBHI

1 bankruptcy estate regarding potential employment opportunities
2 related to the estate. I believe that subsequent to this I was
3 approached about the possibility of employment at Barclays.
4 Either late in the week of September 15th, or early in the week
5 of September 22nd, you see that?

6 A. Yes, I do.

7 Q. And when you said that in your declaration, when you said
8 you were approached about the possibility of employment at
9 Barclays, you were referring to the conversation you had with
10 Mr. Lowitt, is that right?

11 A. Yes, that's what I was referring to.

12 Q. You were referring to the conv -- so it was Mr. Lowitt who
13 approached you about employment at Barclays?

14 A. About the possibility of employment at Barclays, yes.

15 Q. Now, did there come a time when you entered into a written
16 employment agreement with Barclays?

17 A. Yes, there was. It's consistent with what's in this
18 declaration here. So I signed a contract on October 10, 2008
19 and dated it the same day.

20 Q. Okay. Would you turn to Tab M, 117 in the binder before
21 you, sir.

22 A. 217, sir?

23 Q. 117.

24 (Pause)

25 Q. Have you turned to the document, sir?

1 A. Yes, I have.

2 Q. Is that a copy of the contract that you were offered by
3 Barclays in September of 2008?

4 A. Yes, it appears to be, yeah.

5 Q. And that contract provides for a special cash award of
6 700,000 dollars, is that right?

7 A. Yes, it does.

8 Q. And it provides for a 2008 guaranteed cash bonus of
9 1,185,000 dollars, is that correct?

10 A. That's correct.

11 Q. And that bonus was in respect of your Lehman bonus that
12 you hadn't received, is that right?

13 A. I don't know what it's in respect of.

14 Q. Say again, sir?

15 A. I didn't know. I didn't know what it was in respect of.
16 It was not explained to me.

17 Q. Did you have -- when you got the contract did you not know
18 why you got a 2008 guaranteed cash bonus from a company you
19 hadn't worked for?

20 A. It was a contract to join Barclays Capital. I didn't
21 think about for what service and over what time period.

22 Q. Did you ask anybody why they gave you a contract for a
23 company that you joined in -- well, did you think your bonus
24 for your work at Barclays in the last three months was
25 1,185,000 dollars?

1 A. I didn't think about it in those terms. I was informed
2 that there was a group of people. And it was explained to me
3 as somewhere between 100/200 people that were being offered a
4 contract. I understood the terms of the contract were similar
5 to the ones I had, as described here.

6 Q. You didn't view the 2008 guaranteed cash bonus, sir, as
7 replacing the bonus you would not have received after Lehman
8 went bankrupt?

9 A. I don't think I thought about it in that sense. I just --
10 I was offered a contract; I understood the terms of the
11 contract. And on October the 10th, I signed the contract.

12 Q. Did you negotiate the contract at all?

13 A. There was some minor terms I negotiated. I did not
14 negotiate any of the dollar amounts. But there was some
15 modifications that I asked for on some of the other -- some of
16 the other paragraphs.

17 Q. And when you were having -- when you were involved in
18 negotiations about your employment contract, did you mention
19 the dollar amounts at all to the people at Barclays who you
20 were speaking to?

21 A. No, I don't think so. I was -- my recollection is I only
22 discussed this contract with the person in HR who was, I
23 assume, was doing a similar thing for anyone who had been
24 offered contracts. I don't recall discussing the dollar
25 amounts with her. I did not discuss the dollar amounts with

1 anyone else.

2 Q. And you didn't ask anyone why you were getting a bonus in
3 respect of 2008. Is that your testimony?

4 A. Yes.

5 Q. Now, in the work that you did in connection with the
6 prebankruptcy discussions, you referred a little while ago to
7 some work you were doing in the few days leading up to the
8 weekend. One of the things you did is you helped to coordinate
9 responses from various Lehman constituents to request for
10 information from Barclays, is that right?

11 A. Yeah. Let me just make sure I understand. In the period
12 prior to the 15th, is that right?

13 Q. That's right, in the few days leading up to bankruptcy
14 weekend?

15 A. Yes, that's right. We had a team of people at the offices
16 of Simpson Thacher, I think I recall. There was a team of
17 Barclays' people there. And they had a whole range of requests
18 for financial information.

19 Q. And who were the Barclays people you were dealing with at
20 that time, before the weekend?

21 A. I believe James Walker was there, Gary Romain, Chris
22 Weidler. I remember meeting Mike Keegan and John Monn (ph.).
23 I remember TJ Givenda, Matt Hughey. There was actually a team
24 from PricewaterhouseCoopers that they had engaged to help them.
25 So there were individuals from PWC. There were others I'm

1 sure, they're the names that I recall.

2 Q. And the transaction, it was contemplated -- the work
3 around the transaction and that transaction didn't happen, is
4 that right?

5 A. That transaction did not happen. I should have said to
6 the prior question. It's possible I met Patrick Clackson, but
7 I actually don't recall.

8 Q. And in any event, that transaction didn't happen, yes?

9 A. That's correct.

10 Q. So you come back on the Monday and you learn on the Monday
11 morning, after you came back to the office, that negotiations
12 had commenced around a sale of a portion of the business -- a
13 portion of the firm, yes?

14 A. Yeah. Parts of the U.S. business, yeah.

15 Q. And you understood that the negotiations you'd heard about
16 concerned a transaction whereby Lehman would transfer certain
17 assets and liabilities to Barclays, yes?

18 A. That's correct, yeah.

19 Q. And your role in those post-bankruptcy discussions were
20 similar to the role you had played in the prior talks, correct?

21 A. Similar in some respects and not so in others I think.
22 There was an ongoing need for information that the Barclays
23 team needed, and I helped to coordinate that. Part of that was
24 connecting Barclays' people with Lehman people. Part of it was
25 supplying information. And then there was also an effort that

1 night to understand the terms of the transaction as they were
2 being negotiated. And to help to assemble that.

3 Q. And the work that you were doing to assemble this
4 information and understand the terms of the transaction went on
5 overnight from Monday into the Tuesday, is that right? Your
6 work?

7 A. Well, it continued for the rest of the week, actually.

8 But --

9 Q. But, good, sir, I'd like to focus on the Monday I asked
10 you about. From Monday to Tuesday you worked all night, yes?

11 A. I worked until 5:00 and then I went home.

12 Q. Okay. Now, in your declaration, sir, you say in paragraph
13 7 that the work -- you were asked from time-to-time to assemble
14 information, do you see that?

15 A. Yes, I do.

16 Q. And when you say from time-to-time, you don't mean to
17 suggest to the Court that those requests were only occasions,
18 do you?

19 (Pause)

20 A. Well, I think I meant from time to time throughout the
21 course of that week.

22 Q. You didn't mean to suggest something like once on Monday
23 and once on Thursday, you were working on this pretty
24 constantly during that week, is that right?

25 A. I was working -- I was working on it fairly constantly

1 that day and night. I was working on it for the rest of the
2 week. But I also was working on a number of other things that
3 week, as a consequence of the sale transaction, but not
4 directly related to it.

5 Q. And in the portion of the week from the 15th to 16th,
6 where you worked all night, you learned the terms of the
7 agreement that was reached, is that correct?

8 A. I would say I learned, or I helped assemble an
9 understanding of assets that would be moving to Barclays, and
10 liabilities that would be assumed by Barclays. I don't think I
11 understood all of the terms of the transaction and how all that
12 fits together.

13 Q. You did understand the basic structure of the transaction?

14 A. I'm not sure I can say that either. I -- I -- you know --

15 Q. When you learned what you did learn about the transaction,
16 sir, you were participating in a meeting between the bankers
17 for both, Barclays and Lehman, isn't that right?

18 A. I was involved in a meeting between Barclays and
19 Lehman, and their bankers, for a part of that night, yes.

20 Q. Okay. And that's when you learned that an agreement had
21 been reached, when you were participating in that meeting
22 between the bankers for Lehman and Barclays, correct?

23 A. Yeah, I believe that the outcome of that meeting was an
24 agreement, yeah.

25 Q. Well, you say you believe, sir. Did you learn in the

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1 meeting your were participating in, between the bankers for
2 Lehman and Barclays in the early morning hours of the 16th of
3 September that an agreement had been reached?

4 A. I think so. There were a number of different parts of the
5 transaction that had been negotiated. That meeting was very
6 focused on negotiations around the real estate. And there were
7 potential -- there were discussions around the potential
8 inclusion in the sale process of certain of the businesses in
9 South America, and I think Canada.

10 Q. Okay.

11 A. So those discussions were a specific part. The
12 transaction, as a whole, was much broader. I think that the
13 end result of all of that was that there is an agreement.

14 Q. Okay. So you learned there was an agreement. And you
15 knew it had something -- and you learned about the real estate
16 piece, yes?

17 A. Yes.

18 Q. And you learned about the inclusion of some subsidiaries,
19 yes?

20 A. Well, I think exclusion at that point. I think my
21 understanding was that most of them had been excluded at that
22 point. Some of the discussions that were around other
23 businesses or entities that might be included I think were sort
24 of delaying and complicating it. And my recollection is that
25 the decision was made to keep them out.

1 Q. And you learned some terms of the agreement with regard to
2 the transfer of securities, is that right?

3 A. Well, prior to that meeting starting there had been a
4 series of negotiations around which assets specifically would
5 move and how they should be valued. I think I had that
6 understanding going into that meeting, and I don't think that
7 understanding changed as a result of that meeting.

8 Q. It didn't change much during the night?

9 A. Not between the start and the end of that particular
10 meeting.

11 Q. And when you learned that an agreement had been reached
12 and that the terms regarding the securities assets hadn't
13 changed much overnight, you informed your boss, Mr. Lowitt, is
14 that right?

15 A. I just want to be careful with time. I wouldn't say
16 overnight. I think it was between, let's say 2 in the morning
17 and 5 in the morning.

18 Q. Sometime around 5:00 in the morning on Tuesday, September
19 16th, you communicated with Mr. Lowitt to tell him what the
20 terms of the deal were, isn't that correct, sir?

21 A. My recollection is I had an in-person meeting with Bart
22 McDade. And that was a follow-up to earlier meetings that I'd
23 had with Bart and others earlier that night and earlier that
24 morning. And then Ian was not around at that time, so I sent
25 him an e-mail, which effectively I think confirmed what I

1 thought he understood already from the meetings earlier that
2 night.

3 Q. And the e-mail that you wrote, you wrote shortly after you
4 had learned that a deal had been reached, and you developed an
5 understanding of its terms, correct?

6 A. My recollection is that the meeting ended, there was an
7 agreement. The agreement needed to be approved by the board.
8 But I had discussed it with Bart. And then I recall writing
9 that e-mail I think in the back of a cab actually on the way
10 home Ian and Fowler.

11 Q. Would you take a look at tab M-8 in your binder, Mr.
12 Kelly. It's the e-mail marked as Movants' 8, the e-mail you
13 just described that you wrote to Mr. Lowitt to describe the
14 terms of the deal?

15 A. Yes, that's the one.

16 MR. GAFFEY: Your Honor, I offer Exhibit M-8 in
17 evidence.

18 MR. SCHILLER: No objection, Your Honor.

19 THE COURT: It's admitted.

20 (Movants' Exhibit M-8, e-mail to Mr. Lowitt describing terms,
21 was hereby received into evidence as of this date.)

22 THE COURT: It raises actually a question in my mind
23 as to what's -- what needs to be done with documents. I
24 thought that all the documents in these binders had already
25 been admitted.

1 MR. GAFFEY: Until a second ago the objection was
2 hearsay. There are some to which Barclays has objected, Your
3 Honor.

4 THE COURT: Fine.

5 MR. GAFFEY: Is the point. The list we gave you on
6 Monday --

7 THE COURT: I have this list and I haven't compared
8 the list with documents as they're being used. But if there's
9 no objection it's admitted.

10 MR. GAFFEY: Thank you, Your Honor.

11 MR. SCHILLER: I think we had withdrawn this on
12 Monday.

13 THE COURT: Fine.

14 MR. SCHILLER: Your Honor, we'll make sure they
15 understand --

16 MR. GAFFEY: I understood, Your Honor, but we can take
17 that up at another time.

18 THE COURT: Okay.

19 BY MR. GAFFEY:

20 Q. Now, when you say in your e-mail that it took all night
21 and lots of back and forth, that's a reference to the all night
22 sessions we were just talking about, is that right, Mr. Kelly?

23 A. It's a reference to the final meeting that I participated
24 in which took a number of hours, yes.

25 Q. And you refer in your e-mail to the final price, you say

1 it did not change meaningfully, you've seen that?

2 A. Yes, I do.

3 Q. And that's the price with respect to the securities assets
4 that we've talked about, is that right?

5 A. Well, I going to say approximately a five plan or an
6 economic loss. And I think what I was referring to was that
7 the economics of the transaction hadn't changed meaningfully
8 from the prior conversion or meeting, actually, that I had with
9 them.

10 Q. Okay. So -- and the economics of the transaction included
11 a five billion all in economic loss versus your marks, is that
12 correct?

13 A. The -- yeah, the transaction included an approximately
14 five billion dollar difference between the values that had been
15 negotiated for the assets that were moving, and their most
16 recent book values on the books of Lehman.

17 Q. And that five billion dollar all in economic loss was not
18 a factor that changed meaningfully over the night, is that
19 correct?

20 A. Yeah, that's right. It did not change meaningfully as a
21 result of the meeting that we spoke about earlier. And the
22 reason for that is I recall the negotiations around real
23 estate, which took several hours, resulted in an agreed value
24 that was close to book. So there wasn't really an economic
25 gain or loss resulting from the continuing discussions.

1 Q. So your testimony is that the number was close to book and
2 there was no gain or loss?

3 A. On the real estate my recollection is that the prices that
4 were negotiated in the context of the transaction were not
5 meaningfully different.

6 Q. But in the context of the securities assets there was a
7 five billion dollar loss against the books?

8 A. That's right, yeah. To answer your question that's
9 specific to real estate. And I think the fact that nothing
10 else changed, meaning that the entities or operations in South
11 America weren't moving. So that didn't result in an impact.

12 Q. I may have confused us here, sir. With regard to
13 securities that were being transferred there was a five billion
14 dollar loss against the books, is that correct, yes or no?

15 A. Well, it does -- as I explained, there was an
16 approximately five billion dollar difference between the
17 negotiated values and the most recent book value as to Lehman.

18 Q. And that was against the book value as of the morning of
19 the 16th, correct?

20 A. At the time I don't recall thinking at the time when the
21 book value was as of. As I've spent time thinking about it
22 more recently I think that any book values from that day
23 reflecting prices on that day would be highly unlikely. I
24 think that the -- you know, the book values that we were using
25 were most likely the close of business prices from the Friday,

1 the 12th.

2 Q. And when you say they were most likely, the books that
3 were being used at the close of business on Friday, when you've
4 thought about this more recently, have you thought about it
5 with some other people, or have you thought about it just
6 yourself?

7 A. I thought about it myself, preparing for today.

8 Q. And as you prepared for today have you had any discussions
9 with anyone about these thoughts you've had what really must
10 have happened, what was likely to have happened, has this
11 affected the Friday marks?

12 A. I talked to my lawyers about it, yeah.

13 Q. Apart from your lawyers have you talked to anybody else
14 about it?

15 A. No.

16 Q. And did you come to the view that -- you know, as you've
17 thought about it more recently to prepare for today that it
18 must have been the Friday marks, was that after you spoke to
19 your lawyers?

20 A. Well, I think as I thought about what was practical and
21 feasible and what was not, the infrastructure of the firm on
22 that Monday was just not working. There were people who had
23 left with their boxes, there were people that didn't show up
24 for work. And it was chaotic and very difficult in the sense
25 that getting information was difficult to impossible. And I

1 think as I've thought about could it be possible that prices
2 would be available on the 16th to represent -- sorry, the 15th,
3 to represent prices on that day, I think the answer is no. And
4 the reason for that is because the valuations are done on a
5 like business, in any case, in a normal state with the firm
6 operating as normal, and all the people in their seats doing
7 what they normally do. Prices come out the day after for the
8 close of business the night before. So you would typically
9 expect to get prices for a Friday night close, I think sometime
10 on Monday. It was a daily process. My understanding is that
11 there was not an ability to do it and close it more often than
12 daily, and that it was sort of a process whereby positions and
13 prices fed down into systems on an overnight basis.

14 Q. Well, that's if --

15 A. Combined with the fact that people just -- people were not
16 there. Well, certainly, a number of people were not there. It
17 was just, I think, highly unlikely even in a normal state, but
18 certainly in a state like it was on that day, to have prices as
19 of that day. So I think to answer your question --

20 Q. I think my question was when did you come to this
21 realization, sir. So my question was when you came to this
22 realization? So if you could answer that question I'd be
23 grateful. Did you come to this realization after you met with
24 your lawyers?

25 A. I came to that realization more recently.

1 Q. More recently?

2 A. Yeah. I think at the time if I put myself back at that
3 time, I don't think I thought about when the book phase were
4 at -- sorry, were as of. I was just working off a book value.
5 I think the thoughts I've just described are thoughts that to
6 me seem rationale. And I've thought about more recently.

7 Q. Okay. I'm still going to push for answer to when. How
8 much more recently did you come to this realization that it
9 must have been the books from the 12th and not the books on the
10 day?

11 A. I think in the last six months or so.

12 Q. Okay. And did you read anything that brought you to the
13 realization that made you start to think about this?

14 A. No.

15 Q. Did you ever read the motion papers in this case?

16 A. Excuse me?

17 Q. Did you ever read the motion papers in this case?

18 A. No, I didn't.

19 Q. Okay. Have you ever had them described to you?

20 A. Parts of it, yeah.

21 Q. Ever have anyone describe to you that there's an issue as
22 to whether or no there was a five billion all in economic loss
23 against the marks as of September 16th?

24 MR. SCHILLER: Your Honor, I'm just going to object to
25 the extent that he has counsel, perhaps he would have discussed

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1 my pleadings for counsel, I don't know. But if that's the case
2 then I would object to the extent he's asking for a
3 conversation with his lawyers. I don't know that that's the
4 case.

5 THE COURT: Well, excluding conversations with
6 counsel. You can answer the question.

7 A. Sorry. Could you repeat the question?

8 Q. Did you talk to anybody and learned that one of the issues
9 in this case is whether there was a five billion dollar all in
10 economic loss against the books as of September 16th?

11 A. I don't believe so, no. Excluding counsel

12 Q. So just as you didn't know you were going to testify in
13 this trial six months ago, did you, sir?

14 A. That's correct.

15 Q. Okay. And your deposition had already taken place, is
16 that right?

17 A. I was deposed in August, and November.

18 Q. So sometime between August and when you learned you were
19 going to testify you came to this view that it must have been
20 the Friday marks, is that right?

21 A. I was asked by counsel.

22 Q. Now, when you wrote your e-mail to Mr. Lowitt on the
23 morning of September 16th you were not referring to the Friday
24 marks, were you?

25 A. I don't think I was referring to a date of a particular

1 meeting. I don't recall at the time thinking when the -- when
2 the marks were as of.

3 Q. Well, at the time you were the global financial controller
4 of Lehman Brothers, is that right?

5 A. That's correct.

6 Q. And the books of Lehman Brothers were something of
7 significant concern to you in your role as global financial
8 controller, is that right?

9 A. Yes, they were.

10 Q. Would you be in a habit of writing e-mails to the chief
11 financial officer of Lehman about the marks without an idea of
12 what day you're talking about?

13 A. Well, I'd say a few things. One, all of this happened in
14 a very hurried and hectic manner. It might be helpful to
15 explain what my responsibilities were and what they were not as
16 far as senior people in finance were concerned. The
17 responsibility for the firm's securities inventory and the
18 marks around that, and the control processes around that was
19 the responsibility of the product controller, Gerry Reilly and
20 his team. The responsibility for funding the firm and
21 determining what assets were encumbered or not encumbered,
22 pledged or not pledged, was that of the treasurer Paolo
23 Tonucci. And my role as the financial controller was reporting
24 the firm's results for management purposes, for regulatory
25 purposes, and for external financial statement purposes.

1 Q. And when you did that --

2 A. Most -- sorry, most of my processes were monthly
3 processes, which involved a process around the general ledger
4 which closed monthly. I was -- the information certainly
5 contained -- that we reported certainly contained information
6 that fed in from product controllers. But the responsibility
7 for the sort of the daily marks and the controls, and the
8 reconciliations around that sat with the product control team.

9 Q. And, again, sir, I believe my question was when you wrote
10 to the chief financial officer, was it your habit to use the
11 term marks without reference to any particular day, regardless
12 of whose responsibility it was who kept the books. When you
13 wrote to the chief financial officer on the 16th of September
14 and you said there was a five billion dollar overall
15 economic -- all in economic loss versus our marks, you meant
16 the marks on the 16th, didn't you?

17 A. No, I didn't --

18 Q. Then it was some other day?

19 A. I think I can only repeat what I said. I didn't think
20 what day the marks were as at. When I wrote that e-mail on
21 that day, sitting here now, I don't recall thinking about the
22 moment in time that those marks were as of.

23 Q. So sitting here, your testimony is when you wrote about a
24 five billion dollar loss against the marks to the chief
25 financial officer of the company, your direct superior, you

1 didn't give much thought to what marks you were talking about?

2 A. I just -- I have to repeat what I already said --

3 Q. Actually, sir, I prefer you answer the question I asked
4 you.

5 A. At the time I didn't think whether the marks were as of
6 that moment in time, which would have been impossible, sometime
7 on the Monday or sometime other than the Monday. I did not --
8 sitting here now I don't recall the moment in time that I
9 thought the marks were as of.

10 Q. And in all this analysis you've done to come to this more
11 detailed view, you're still at the point where you'd be
12 speculating, you don't know, at least, whether the books had
13 been marked or not marked on the 15th or the 16th, is that
14 right?

15 A. Well, I think its -- I think it's actually much stronger
16 than speculation.

17 Q. You're basing it on people who aren't at work, right?

18 A. No. I'm basing it on the fact that there was a monthly --
19 sorry, a daily process which was in a normal environment on an
20 overnight basis. So -- and, you know, stress environment like
21 the one we're in we'd certainly be in no better position to do
22 all of that for the reasons I explained. So my understanding
23 is that the closing positions and prices for any portfolio of
24 assets, and all portfolios of assets were available on an
25 overnight basis, once a day, sometime the following day.

1 Q. Well, let's account for the 15th, the Monday.

2 MR. GAFFEY: Can you put the calendar back up?

3 Q. It was your understanding that that process was followed
4 on a daily basis with marks available the following the day,
5 correct? Yes?

6 A. No. Not for that day in particular. No. I can't.

7 Q. Well, in normal times, sir, that's what happened, yes?

8 A. If you pick any other day than I would agree with you.

9 Q. Okay.

10 A. Before then. Yeah.

11 Q. Any other day except the 15th you'd agree with me that
12 there'd be marks available in the morning? Yes?

13 A. Before that date, yes.

14 Q. Okay. And you'd also agree with me --

15 A. Well, no, I'm sorry. I -- no, I -- you said the morning.
16 It's sometime the following day. I don't know precisely when.

17 Q. Okay. And you'd also agree with me that the marks, when
18 they're done, are not all done on a daily basis, correct? Some
19 marks are done at longer intervals, right?

20 A. I'm not sure about that, actually.

21 Q. Well, would you agree with me too, sir, that some marks
22 are done on an automated basis? No human intervention
23 required?

24 A. I'm not -- I can't talk to that. I'm not close enough to
25 that process.

1 Q. If I wanted the answer to that question would I ask Mr.
2 Lowitt?

3 A. I think you would have asked Gerry Reilly.

4 Q. Well, Mr. Reilly's been gone --

5 A. Or -- or --

6 Q. -- since December of 2008, correct, sir?

7 A. Yes.

8 Q. And Mr. Lowitt was the chief financial officer of the
9 corporation, correct, sir?

10 A. That's right.

11 Q. And you understood he was the senior officer responsible
12 for the maintenance of the books and records of Lehman,
13 correct?

14 A. Yes.

15 Q. And you were a direct report to him, correct?

16 A. I was, yes.

17 Q. And so, sir, if you wanted to know the state of the books
18 of Lehman you'd ask the chief financial officer, wouldn't you?

19 A. Well, I think --

20 Q. Especially since Mr. Reilly died. After Mr. Reilly died
21 you'd ask Mr. Lowitt, wouldn't you?

22 A. What? It's a general question, the state of the books.
23 If --

24 Q. It's quite a specific question, sir. The question is
25 would you ask Mr. Lowitt?

1 A. If the question is when would you expect to know prices
2 from the prior day you could ask Mr. Lowitt, but I think a more
3 likely place to ask would be people that worked for Gerry
4 Reilly.

5 Q. Did you ever talk to Mr. McDade about the values of the
6 assets that were going to be transferred in the transaction?

7 A. By that you mean the negotiated values --

8 Q. I mean say words, and Mr. McDade was there and heard them.
9 Did you speak to Mr. McDade about the value of the assets that
10 were transferred in the transaction? That's what I mean.

11 A. I recall talking to Bart about the difference between the
12 values and the -- the negotiated values and the book values.
13 It's quite possible we talked about the aggregate values. I
14 don't have a specific recollection of that, though.

15 Q. Now, the five billion all-in economic loss that you wrote
16 to Mr. Lowitt about, you also wrote that to Mr. Reilly and Mr.
17 Tonucci. Is that right?

18 A. Just Mr. --

19 Q. I beg your pardon. Mr. Tonucci and Mr. Lowitt, yes.

20 A. Yes.

21 Q. You know, if you take a look at Exhibit MA and you'll note
22 that Mr. Lowitt, your boss, writes back to you "You are a hero.
23 Well done. Ian." You have any idea why your superior was
24 congratulating you on the deal?

25 A. I don't know. I think it was relief that something had

1 been done.

2 Q. It wasn't because you had anything to do with it?

3 A. I had stayed around through the remainder of that night.

4 I described the activities that I recall occurring during that
5 period of time. I don't think that I was important to the
6 finalization of the agreement or the negotiation of that.

7 Q. Yet did there come any time, sir, where you made
8 calculations concerning marking down the books to reflect this
9 five billion all-in economic loss?

10 A. I don't recall that, no.

11 Q. You don't recall ever making notes reflecting a markdown
12 from book value?

13 A. I recall making notes around what the values of each of
14 the asset classes was at a, or the expected values at different
15 points in time, but not in terms of how to mark down the books
16 as a result of that.

17 Q. And when you wrote your early morning e-mail to Mr. Lowitt
18 and Mr. Tonucci, Mr. Tonucci, what was Mr. Tonucci's title?

19 A. He was the firm's treasurer.

20 Q. And the firm's treasurer wrote back to you fantastic.
21 Great work. Paolo. Any idea why Paolo was congratulating you?

22 A. I would repeat the answer to the question about Ian. I
23 don't know. I think it was relief at a transaction having been
24 agreed to.

25 Q. Did you ask either one of them why they seemed to be

1 congratulating you --

2 A. No.

3 Q. -- on this deal?

4 A. No.

5 Q. Now, the five billion dollar difference between the books
6 and the agreed value was the result of a series of discussions
7 conducted at a portfolio level. Is that right?

8 A. That's correct, yes.

9 Q. And representatives from Barclays and Lehman conferred
10 about particular asset classes to determine how much difference
11 there would be between book value and the agreed value,
12 correct?

13 A. I'd say that's partly right and partly not. I think
14 the -- there were a series of discussions going on between
15 Barclays and Lehman. The end result of that was negotiated
16 values for each of the portfolios or each of the asset classes.

17 Q. I guess my point is it's done by class, not by particular
18 security, yes?

19 A. That was my understanding, it was done by asset class, but
20 I just want to make sure I make the point, though, that I don't
21 know if those discussions involved a discussion around the
22 difference between a negotiated value and the Lehman marks. I
23 know that they derived a negotiated value by asset class.

24 Q. And your understanding is that the five billion dollar
25 item was an aggregation, correct?

1 A. It was an aggregation of each of those conversations in
2 terms of determining the negotiated valued and then -- and then
3 that was compared, at least by the Lehman team, with the book
4 values.

5 Q. And it wasn't done CUSIP by CUSIP?

6 A. I wasn't part of the discussions. I don't believe it was.

7 Q. Now, sometime after this e-mail you learned that the plan
8 was there would be a markdown of Lehman's books to reflect the
9 five billion dollar difference, correct?

10 A. I think sometime after that we started the process to --
11 well, a couple of things. One, we looked at what the expected
12 impact of the transaction would be before it closed on what the
13 books of Lehman were, and, then, subsequent to the transaction
14 closing there was a very large effort to reflect the actual
15 transaction and its impact on the books.

16 Q. And the we you refer to obviously includes yourself, yes?

17 A. For parts of that, yeah.

18 Q. And the plan was that the assets on Lehman's books would
19 be marked to the negotiated sale price, right?

20 A. I don't know, actually. I think the plan was that the
21 transaction, as it was eventually agreed to, would be reflected
22 in the books and records. I can't say if there was a plan to
23 adjust the existing or the preexisting marks prior to that
24 process.

25 Q. Well, at some point you did learn that there was a plan to

1 reflect the markdown on Lehman's books, yes?

2 A. I think my understanding was that there was a plan to
3 reflect the transaction on Lehman's books. I think the deal
4 changed so much over the course of that week that I'm actually
5 not sure how relevant the contents of this e-mail were at the
6 end of the day in terms of reflecting the ultimate transaction.

7 Q. It reflected the transaction as you understood it on the
8 morning of the 16th of September, yes, Mr. Kelly?

9 A. This e-mail?

10 Q. Yes.

11 A. Certain parts of it, yeah. I mean, when I say economic
12 loss that's a consequence of a lot of conversations at a
13 portfolio level.

14 Q. And you understood the deal included an economic loss to
15 Lehman?

16 A. At the time I understood that the values negotiated for
17 the assets were lower than the preexisting books values, so,
18 yes.

19 Q. Now, you also refer in here to an extra one billion of
20 comp beyond our accrual. Do you see that?

21 A. Yes, I do.

22 Q. And what did you mean when you wrote about an extra one
23 billion dollar of comp beyond accrual?

24 A. My understanding was that the compensation liability for
25 employees that were moving from Lehman to Barclays was

1 negotiated at an aggregate value of 2 billion dollars. At the
2 time I wrote this I had an understanding that the existing
3 accrual on the books of Lehman or the estimate -- everything
4 was an estimate -- the estimate of that accrual was
5 approximately one billion dollars.

6 Q. And so that would make the -- what you reference in your
7 e-mail as to an accrual of a billion over what's shown on
8 Lehman's books, yes?

9 A. That's correct.

10 Q. And the accruals for employment expense was something that
11 was within your area of responsibility at the time, correct?

12 A. The accounting for it was, yeah. The decisions around it
13 were not.

14 Q. Well, the amount and who got paid is somebody else's job.
15 Keeping track of what it would be was yours, yes?

16 A. Yeah, it was, but I think it -- the compensation is an
17 area, I think, that's probably different from any other, and
18 given the confidentiality around it, and so, the output of
19 calculations around bonus accruals came into my group.

20 Q. Sir, was it part of your job to have knowledge of how much
21 was accrued on Lehman's books for compensation?

22 A. Yes, it was.

23 Q. Thank you. Now, let me direct your attention, Mr. Kelly,
24 to Exhibit M-235, which is tab M-235 in your book. Tell me
25 when you've had a chance to take a look at that. You've got

1 M-235 at hand, sir?

2 A. Yes, I do.

3 Q. And you recognize the document?

4 A. Yeah, I recall the -- I recall this as being one of
5 several templates, actually, that were prepared to summarize
6 the terms of the transaction.

7 Q. And would you turn to -- you see there's portions of the
8 document that contain handwriting?

9 A. Yes.

10 Q. And the handwriting is yours. Is that right?

11 A. Yeah, that's all mine.

12 Q. And these are notes that you made in and around the time
13 you were doing work around the transaction?

14 A. Yeah, it was. The time -- it's difficult to pinpoint the
15 time. The first column is labeled as September 17, so it was
16 presumably on or after that date.

17 Q. The question is a bit more general, sir. These are notes
18 you made after the transaction was negotiated and while it was
19 on its way to approval. You made these notes during the week
20 of the 15th of September, correct?

21 A. I can't say that for sure, actually. I think it's
22 probably likely that that's the case, but the efforts to
23 reflect the transaction took a long time. I was pretty closely
24 involved with it for a few weeks, but it's probably that week.

25 Q. Well, I'd like to concentrate on the week of the 15th

1 through the 22nd, that is from the day that Lehman filed for
2 bankruptcies through the day the sale transaction closed. Do
3 you have that period of time in mind, sir?

4 A. Yes.

5 Q. Okay. And one of the things you did during that week was
6 help to prepare a closing balance sheet to show the ultimate
7 effect of the transaction. Is that right?

8 A. That was an objective, to prepare a closing balance sheet,
9 but it was a work in progress.

10 Q. The question for you is you worked on it.

11 A. I worked on versions of it.

12 Q. Okay.

13 A. And --

14 Q. And you worked on versions of it with Brett Beldner. Is
15 that right?

16 A. Brett was on my team. I believe he was working on it,
17 yeah.

18 Q. And if you would turn to page 115-145 within the exhibit
19 you'll see some notes down the right-hand side. You see those?

20 A. Oh, I'm sorry. It's not this. Different tab. Same tab.

21 Q. Same tab.

22 A. Okay.

23 Q. The Bates number at the bottom.

24 A. Okay. The next --

25 Q. All right. Are you with me on the notes? They're up

1 there on the screen too.

2 A. It's the following page. Yes.

3 Q. Okay. And the notes down the right-hand column there are
4 yours?

5 A. Yes.

6 Q. And the word at the top there is Brett. Is that correct?

7 A. I think so.

8 Q. And the date that you've written there is September 20th.
9 Is that right?

10 A. I write as of 9/20.

11 Q. Is that what the little sign means before 9/20? Okay?

12 A. Yeah.

13 Q. And the calculations you're doing down the right-hand side
14 are to calculate the impact at Barclays first day of the
15 transaction. Is that right?

16 A. Sorry. The impact at Barclays?

17 Q. Yeah.

18 A. Let me just understand the question. You're asking if
19 this was an attempt to look at the -- if you, like, the opening
20 balance sheet to Barclays of the transaction?

21 Q. That's right.

22 A. No, I don't think so.

23 Q. Do you have any recollection of working on an opening day
24 balance sheet for Barclays with Brett Beldner?

25 A. Well, if it's during this period of time I was working on

1 Lehman related matters. I remember working on the balance
2 sheets of Barclays of the transaction that were continued for
3 several months, but I didn't start that until October, maybe,
4 November, time frame.

5 Q. Okay. So it's your testimony that you were not involved
6 in calculating an opening day balance sheet to reflect the
7 first day impact of this transaction on Barclays during the
8 period of time you were working at Lehman? Is that your
9 testimony?

10 A. If the question is whether I was working on an opening
11 balance sheet from Barclays perspective then that is my
12 testimony. If the question is related to what's the set of
13 assets and the set of liabilities moving across then -- and
14 there were different versions of that, that set, those sets of
15 schedules were intended to represent negotiated values, I think
16 at all times it was intended to capture the transaction from
17 Lehman's perspective. Could Barclays have used it? Possibly.
18 I was not involved in that, no.

19 Q. Did you ever prepare or participate in the preparation of
20 an opening day balance sheet that was sent to James Walker
21 during the time you were employed by Lehman?

22 A. Well, I think that's what I'm referring to. I think if I
23 sent information to James Walker, I remember that, that
24 information included estimates of what the negotiated balance
25 sheet looked like from the perspective of Lehman.

1 Q. While you were employed by Lehman, sir, did you
2 participate in the preparation of an opening day balance sheet
3 that calculated the equity it would deliver to Barclays, the
4 transaction would deliver to Barclays?

5 A. No. I'd say I worked on preparing estimates of what the
6 impact to Lehman would be of the transaction.

7 Q. I got myself a little distracted there, sir. Would you
8 turn to page 115 to 152 within the same exhibit?

9 A. Yes, I do.

10 Q. And is that your handwriting on that page?

11 A. Yes, it is.

12 Q. And am I reading your handwriting correctly in the center
13 column at the top where you've written key issues?

14 A. Yes.

15 Q. And the number one key issue, does that say marking book
16 down?

17 A. No, I think that says matched book down.

18 Q. That says matched book down, sir?

19 A. I believe so. I think that's a "ch".

20 Q. Well, I don't want to fight with you about your
21 handwriting, sir, but is there a "g" at the end of the word
22 matched?

23 A. No, I think -- I think it says matched. I don't think it
24 says marking. I think the third letter is a "k" or a "c". No,
25 that doesn't --

1 Q. Well, I thought it was a "k", too, sir. Is it a "k"? Is
2 the word marking?

3 A. It's possible. I think it says matched.

4 Q. When you write notes, sir, do you often have to speculate
5 about what the word is? This is your handwriting, sir. Do you
6 know whether it says marking or matching?

7 A. I don't often have to speculate.

8 Q. You don't? Okay.

9 A. But I don't know. I think it says matched.

10 Q. I'm sorry to keep it in this orb, but, just for the
11 record, do you think that says m-a-t-c-h-e-d?

12 A. I do. Yeah.

13 Q. You're sure the next word is book, though, right?

14 A. Yes.

15 Q. Okay. That's a "k" there?

16 A. That's a "k".

17 Q. Okay. And the next word is down. So it's matched book
18 down?

19 A. I think so.

20 Q. Does that phrase "matched book down" have any meaning to
21 you, sir?

22 A. Well, the matched book was the repo book or parts of the
23 repo book, so I know that there were changes in the repo
24 balances that were moving across.

25 Q. So, before we move on to some of your other notes, Mr.

1 Kelly, is it your testimony, as you sit here, that this note
2 does not reflect that one of the key issues you noted in your
3 notes was marking book down. That's your testimony?

4 A. My testimony is I believe that that word is matched.

5 Q. Can you think of any reason you would have written marking
6 book down?

7 A. Well, I think the transaction ultimately had to be
8 reflected on the books of Lehman. I don't -- that's not a
9 phrase that I used or use. You know, could it have been notes
10 from a meeting I attended where someone else said it? Yes,
11 it's possible, but I don't think that's what it says.

12 Q. You know, in the book there, sir, is a copy of your
13 deposition transcript. Could you reach for that tab? And you
14 might want to keep a finger or a pen or something at Exhibit
15 235, because we're going to come back to that.

16 And before we go to your deposition, sir, let me just ask
17 you, isn't it a fact that that phrase "marking book down" was
18 to reflect the negotiated sale price and that the books of
19 Lehman would have to be marked down early in the week?

20 A. I don't think that's a fact, because the transaction was
21 changing throughout the course of the week.

22 Q. All right. Let's take a look at your deposition at page
23 315. Actually, sir, why don't you turn first, for context, to
24 page 305?

25 MR. GAFFEY: Steve, can you put Exhibit 235 up there,

1 please, next to it? The first page.

2 Q. Okay. I just want to be sure we're talking about the same
3 document here, sir. At page 305 of your deposition we see that
4 I show you, starting at line 6:

5 "Q. Mr. Kelley, I've put before you what we have marked as
6 Deposition Exhibit 428."

7 Do you see that text?

8 A. Yes, I do.

9 Q. And take a look at the label next to Movants' Exhibit
10 Trial 235, and you see that's Deposition Exhibit 428.

11 A. I'm sorry. Can you just say that once --

12 Q. The label.

13 A. Are you still asking the same question or --

14 Q. No. I'm over on the document itself, sir. Take a look on
15 the screen. Do you see the exhibit tag there, 428?

16 A. Yes, I do.

17 Q. Okay. So you remember my showing you this document at
18 your deposition, right?

19 A. You showed me lots of documents at the deposition.

20 It's --

21 Q. Does that refresh your recollection that I showed you this
22 one at your deposition, your handwritten notes on a simplified
23 balance sheet for LBI?

24 A. We looked at different versions of this. It may well have
25 been this version.

1 Q. Okay. Well, we'll go back and see if we can straighten
2 that out in a second, sir, but, in the meantime, would you turn
3 to page 314 of your deposition transcript? And you see there
4 on 314 at line 15 I ask you to turn to page 115-152 of the
5 exhibit?

6 MR. SCHILLER: Objection, Your Honor. With permission
7 for completeness or would you rather just not do that and wait?

8 THE COURT: Excuse me?

9 MR. SCHILLER: I just would ask that counsel read the
10 question at the top of the page on this issue, page 315, the
11 first question, first answer, along with what he's reading,
12 sir.

13 MR. GAFFEY: Your Honor, I, just --

14 THE COURT: I think that this is impeachment of the
15 most important kind, and I am not going to have anything
16 interrupting this line of questioning.

17 MR. SCHILLER: Okay.

18 THE COURT: This witness has a credibility problem
19 with the Court. A serious one.

20 Q. Now, Mr. Kelly --

21 A. Yes.

22 Q. Looking at page 314 of your deposition transcript from
23 lines 15 through 20. Do you recall this question and answer?

24 "Q. Would you turn, please, to page 115 to 152 of Exhibit 428?
25 There are a few numbered items in the upper right-hand corner

1 of the page next to the phrase 'key issues' circled. Are you
2 with me on the document?

3 "A. Yes."

4 Right? You see that?

5 A. I see it. I just need a minute to catch up there, please.

6 (Pause)

7 A. Okay. Yes.

8 Q. So you agree with -- we're talking about the same
9 document. Do you agree with me now, Mr. Kelly?

10 A. I -- yeah. I think so.

11 Q. Okay.

12 A. Yes. Yes.

13 Q. And the next thing I asked you about the document --

14 MR. GAFFEY: Would you put the document, please, on
15 the screen at 115 to 152.

16 Q. And the next thing I asked you about the document on that
17 page was is that your handwriting and you told me yes. You see
18 that?

19 A. Yes, I do.

20 Q. And I asked you if you recalled making that list of key
21 issues and you said, then, no, you didn't remember it, right?
22 You see that?

23 A. I see that, yes.

24 Q. All right. And turn over to page 315, the part your
25 counsel wanted me to read. At the top it says:

1 "Q. Do you recall writing the phrase marking book down?

2 "A. No."

3 Do you see that?

4 A. Yes, I do.

5 Q. And I asked you

6 "Q. Do you have any explanation for the phrase marking book
7 down on this page of the document?"

8 And your answer was

9 "A. Yeah. I think that was to reflect the transaction on the
10 books of Lehman."

11 Do you see that?

12 A. Yes, I do.

13 Q. All right. So when I asked you that question about this
14 document at your deposition, sir, you were able to read your
15 handwriting then, weren't you?

16 A. Well, evidently yes.

17 Q. Evidently you didn't recognize that word to be matching
18 book down when I took your deposition, did you, sir?

19 A. No. That's correct.

20 Q. And you'd recognized it at the time as the phrase marking
21 book down, didn't you, sir?

22 A. Well --

23 Q. Sir, it's a simple question. When I asked you at your
24 deposition did that phrase say marking book down you recognized
25 it to say that, didn't you?

1 A. Well, you asked me if I had an explanation for it. I, you
2 know, I -- you didn't ask me if I recog -- if that's what it
3 said.

4 Q. Okay, sir. And you didn't tell me the explanation was
5 that wasn't the phrase, isn't that right?

6 A. That's correct.

7 Q. All right. So at the time, you recognized your own
8 handwriting to say the phrase "marking book down" next to the
9 phrase "key issues". Isn't that correct, sir?

10 A. Yeah, evidently it is.

11 Q. Is your understanding that it says "matching book down"
12 something else you've thought about in the last six months, as
13 this day approached?

14 A. No, I haven't thought about it at all.

15 Q. Does it say "marking book down" on your notes, sir?

16 A. I believe it says "match book".

17 Q. That's your testimony today, under oath? You believe that
18 says "match book" on those notes?

19 A. If you look at the word, I believe --

20 Q. I am, sir.

21 A. Okay, I believe the first letter is an M, the second
22 letter is an A, I think the third letter is a T, the fourth
23 letter looks like a C, the fifth letter looks like an H, and
24 then an E and then the last letter, I would agree, could be a G
25 or a D.

1 Q. Okay. So it could be a G. Can you think of any reason,
2 sir, that the phrase "matching book down" would be explained by
3 saying that was to reflect the transaction on the books of
4 Lehman?

5 A. No, I think this is to reflect the fact that the assets
6 that were moving were changing. And --

7 Q. Well, back in your deposition, sir, page 315, the next
8 question and answer I asked you was at line 10. Are you with
9 me in the transcript?

10 A. I should also say, though --

11 Q. Mr. Kelly, could you turn to page 315 of your deposition
12 transcript?

13 A. Yes.

14 Q. And at page 315, take a look at lines 10 through 13.

15 A. Yes, I see that.

16 Q. Do you recall I asked you yet another follow-up question?
17 "What do you mean it was to reflect the transaction on the
18 books of Lehman?" Answer: "To reflect" -- reflect -- "the
19 negotiated sales price." Do you recall being asked that
20 question and giving that answer?

21 A. I don't recall it specifically, but I see it here, so --

22 Q. When you sat at your deposition, sir, were you giving
23 truthful answers to the questions that I asked you?

24 A. Yes, I was.

25 Q. So let's review. Let's put the notes back up on the

1 screen. Does that say "marking book down" at the top of that
2 page, sir? Is that your testimony under oath? Does that say
3 "marking book down"?

4 A. I believe it says "matched book down".

5 Q. And does the phrase "matched book down", if that's what it
6 says, reflect the trans -- have anything to do with reflecting
7 the transaction on the books of Lehman?

8 A. Well it does, and let me explain. I think the second
9 point there is --

10 Q. I think I'd prefer just a yes or no, sir.

11 A. I feel I have to give some context to this answer.

12 THE COURT: Give a yes or no. It's as simple as that.
13 Give a yes or no.

14 A. Okay. Could you repeat the question, please?

15 Q. Does the phrase "match book down" have anything to do with
16 reflecting the transaction on the books of Lehman?

17 A. To the extent that the matched book was changing, then
18 yes. As to the extent that the shorts were changing, that
19 would impact it as well.

20 Q. And the fact that the shorts were changing would have
21 nothing to do with the negotiated sales prices, would it, sir?

22 A. Well, no, if -- it depends how both sides of the balance
23 sheet were changing.

24 Q. Sir, isn't it much more likely that the phrase is "marked
25 book down", and what you meant by that note is the first key

1 issue was to mark the book down to reflect the negotiated sales
2 price under the terms of the sales transaction as you
3 understood them, beginning the morning of the 16th of
4 September, 2008?

5 A. It's possible, but I don't think so.

6 Q. You did understand, based on your understanding of the
7 transaction at the time, that certain of the assets would have
8 to be marked down, didn't you?

9 A. It was my understanding that we had to reflect the sales
10 transaction on the books of Lehman. To the extent that --

11 Q. By marking it down, sir?

12 A. To the extent that the values were different from the book
13 value, then they' have to be adjusted.

14 Q. Sir, was it necessary to mark down the books to reflect
15 the negotiated sales price? Was that your understanding at the
16 time?

17 A. As of the Monday night, Tuesday morning, yes. As the week
18 developed, I can't say I know because the transaction changed
19 so much.

20 Q. On the 16th of September, sir, the day you wrote your e-
21 mail to Mr. Lowitt and Mr. Tonucci about a five billion all-in
22 economic loss versus the marks, it was your understanding that
23 portions of the books would have to be written down to reflect
24 the negotiated price in the transaction. Isn't that correct?

25 A. At that time, yes. If the negotiated values were less

1 than the book values, which they were.

2 Q. And the negotiated values were in the aggregate, five
3 billion less than the book value. Yes?

4 A. That was my understanding at the time, yes.

5 Q. Now, you never discussed -- in the course of your work
6 around the sales transaction, did you have any contact with the
7 lawyers at Weil, Gotshal?

8 A. Through the course of that week, I did, yes.

9 Q. And you never discussed with any lawyer from Weil, Gotshal
10 marking the books down to reflect the negotiated sales price in
11 the transaction as you understood it on the 16th, isn't that
12 correct?

13 A. I don't recall those discussions.

14 Q. Okay, there were times toward the end of the week and the
15 beginning of the next week where you dealt with personnel from
16 Alvarez & Marsal, isn't that correct?

17 A. Yes.

18 Q. And you never told anyone from Alvarez & Marsal anything
19 about marking down the books to reflect a negotiated sales
20 price; isn't that correct?

21 A. I may have. I don't recall that, though.

22 Q. Sir, your best recollection is the only people you ever
23 talked to about marking down the books were Ian Lowitt, Gerard
24 Reilly, and Paolo Tonucci, isn't that correct?

25 A. Well, Bart McDade was part of those conversations, too.

1 Q. Beyond those four men, sir, you don't recall talking about
2 marking down the books to reflect the negotiated sales price to
3 anybody; isn't that right, sir?

4 A. That's correct.

5 Q. Now, you had no reason to believe at that time that the
6 marks at which Lehman carried those assets on its books were
7 inaccurate; isn't that correct?

8 A. No, I had no reason to -- I guess it depends on what you
9 mean by "at that time". I think at that time, I --

10 Q. The 16th of September, 2008, sir.

11 A. At that time --

12 Q. The morning you learned the terms of the sale transaction.
13 You had no reason at that time to believe that the marks at
14 which Lehman carried those assets were inaccurate. Isn't that
15 true?

16 A. Well, as I said before, I didn't think about when they
17 were as that, but as a generally matter, no, I didn't have that
18 reason to believe.

19 Q. And it's this thinking about it since and the realization
20 you came to some time in the last six months that gives you
21 some reason now to think you might have had a reason to
22 question the accuracy of the books. That's your testimony?

23 A. No, no. That's not my testimony. No. I think I
24 understated at the time that it would be reasonable to expect a
25 difference between the negotiated prices and the book values

1 based on the uncertainty of the moment and the markets at that
2 point in time. And also, the size of the transaction; it was a
3 very large transaction at a very uncertain time. So in my
4 mind, there were reasons for a difference. I didn't have -- I
5 did not have a view on the size of the difference.

6 Q. Well, you had a view that the size of the difference was
7 in the neighborhood of five billion dollars, didn't you?

8 A. Yeah. I'm sorry. I should say in terms of the
9 reasonableness of the difference because --

10 Q. Sir, for the moment, I'm not going to ask you about
11 whether you thought it was a good or a bad idea to have that
12 difference. For the moment, I'm not going to ask you if you
13 were involved in agreeing to that difference. What I am going
14 to ask you, sir, is you were aware of the fact of that
15 difference, yes?

16 A. Yes. At that point in time --

17 Q. And you were aware that at the time, you had no reason to
18 believe that Lehman's marks were inaccurate, yes?

19 A. Yes, that's right.

20 Q. And you were aware that at the time, Lehman kept its books
21 in accordance with valuation policies and under U.S. GAAP.

22 Yes?

23 A. Yes, that's right.

24 Q. And you were aware that much of the keeping of those books
25 was automated, yes?

1 A. I -- I don't -- I can't say that. I was not close enough
2 to it.

3 Q. Well, apart from thinking that people weren't coming to
4 work, you had no reason to think that the books on the 16th of
5 April were inaccurate, did you, sir?

6 A. As I said, I didn't think about the point in time.

7 Q. Right, and at that time, then, sir, you understood that
8 the terms of the transaction included a five billion all-in
9 economic loss against the marks at the 16th which at that time,
10 you had no reason to believe were inaccurate. Is that correct?

11 A. I didn't think about the marks as -- in terms of them
12 being as of the morning of the 16th. I did not think about
13 that.

14 Q. And you didn't speak to anyone about this other than Mr.
15 Lowitt, Mr. McDade, Mr. Tonucci, and Mr. Reilly, is that
16 correct?

17 A. my recollection is I was informed of the five billion
18 dollar amount in a conversation with those four individuals.
19 And I believe I was informed by either Ian or Bart.

20 Q. That question, sir --

21 A. Yeah, so --

22 Q. -- is in addition to Bart McDade, Ian Lowitt, Martin
23 Kelly, Paolo Tonucci, and Gerard Reilly, you are not aware of
24 anyone who discussed this five billion dollar overall economic
25 loss versus the marks, is that correct?

1 A. Yes, but I think in my mind, I'd been advised by my boss
2 and by the president of the firm. So I didn't see it as my
3 responsibility to go and then tell other people.

4 Q. Speaking of your responsibility, sir, you don't know if
5 anyone at the time, that is, during the week beginning the 15th
6 through Monday the 22nd, you don't know if anyone told the
7 judge about the five billion all-in economic lost versus Lehman
8 marks, do you?

9 A. No, I was not involved in that process. I don't know.

10 Q. And you don't know if anyone ever followed up to see if
11 anyone did tell the Court about a five billion dollar all-in
12 economic loss versus Lehman's marks, isn't that correct?

13 A. That's correct, but the deal had also changed so much in
14 ways that I didn't understand how it all came together. So I
15 don't think I understood if five billion dollars ultimately was
16 the difference or not.

17 Q. Now, during the week, sir, you learned that there was a
18 written agreement between Lehman and Barclays, is that correct?

19 A. The purchase contract? The purchase contract?

20 Q. Yes.

21 A. Yes.

22 Q. You learned that during the week of the 15th, yes?

23 A. Yes, I did.

24 Q. And you were given a copy of that agreement during the
25 week, yes?

1 A. I -- I may have been. I recall seeing parts of it; I
2 don't -- I don't recall reading it. I may have been given a
3 copy of it.

4 Q. If you turn in your binder, sir, to tab M-1, and I would
5 direct your -- do you recognize that to be the purchase
6 agreement you just mentioned?

7 A. I -- I recall -- if I look through it, I recall pieces of
8 it.

9 Q. Take a look at page 6. Now, the work -- before I direct
10 your attention to a portion of page 6, the work that you did
11 around the transaction, sir, involved collecting information
12 about the assets to be transferred, is that right?

13 A. Yes, that's correct.

14 Q. Okay. So take a look, if you would, at the definition of
15 purchased assets on page 6, subsection D, beginning with the
16 words "government securities". Let me know when you've found
17 that passage, near the bottom of the page. And for your ease,
18 sir, it's up on the screen.

19 A. Yes.

20 Q. See that?

21 A. Yes, I do.

22 Q. See the description, "Government securities, commercial
23 paper, corporate debt, corporate equity, exchange-traded
24 derivatives and collateralized short-term agreement with a book
25 value as of the date hereof of approximately seventy billion";

1 do you see that, sir?

2 A. Yes, I do.

3 Q. And turn back to the first page of the agreement, sir.

4 See the agreement is dated "as of September 16th"?

5 A. Yes.

6 Q. That statement -- let's go back to page 6. That
7 description regarding book value as of the date hereof is
8 false, isn't it, sir?

9 A. I can't say that. I don't know what book value is
10 intended to represent.

11 Q. At the time, on the 16th of September, you understood
12 there was an agreed five billion dollar loss against book
13 value, didn't you?

14 A. Against the value to Lehman.

15 Q. You don't think book value refers to anybody else's book
16 value, do you, Mr. Kelly?

17 A. I don't know what it means.

18 Q. Okay, assume with me --

19 A. I don't -- but I don't know --

20 Q. I'll represent to you, sir, it refers to Lehman's book
21 value. Now, with Lehman's book value as the definition,
22 Lehman's book value as of the date hereof of approximately
23 seventy billion, based on what you knew, that's a false
24 statement, isn't it? Wasn't book value; it was five billion
25 less. Isn't that right?

1 A. Sorry, did you say you're representing the book value is
2 the book value to Lehman?

3 Q. I'll try to slow down, sir. I have a habit of talking
4 quickly. I'm representing to you, sir, that the phrase "book
5 value" means "Lehman's book value". With that in mind, you
6 agree with me, sir, that the description of these securities
7 being transferred to Barclays having a book value as of the
8 date hereof of approximately seventy billion was, to your
9 knowledge, a false statement as of the 16th of September, 2008
10 because you knew there was a five billion all-in economic loss
11 versus the marks as of that day. Isn't that correct?

12 A. I don't know because I haven't seen this. I -- it depends
13 when the book value is as of.

14 Q. Okay. So when you saw this agreement during the week,
15 sir, this may not have been one of the portions that you saw?

16 A. I may have looked at this.

17 Q. Having done your work --

18 A. Probably did.

19 Q. -- around the transaction, sir, with regard to assessing
20 the assets to be transferred, isn't the purchased assets
21 definition a provision of the contract you should have been
22 particularly interested in reviewing?

23 A. Yes, I said I probably did.

24 Q. So you probably did see this definition referring to book
25 value as of the date hereof, September 16th, is that right?

1 A. Is it right that I probably would have looked at it?

2 Q. Is it right that you probably saw it?

3 A. Yes.

4 Q. And at the time that you probably saw it, you would have
5 known it was inaccurate because you knew it was a negotiated
6 price below book value. Isn't that correct?

7 A. No, it depends when the book value is at. If the book
8 value was intended to represent a market value at a point in
9 time, then it depends when. If it's intended to represent that
10 value on the morning of the 16th, then in my mind, that would
11 be the negotiated value.

12 Q. Well, you didn't come to your view, sir, that this was
13 really about the books on the 12th until sometime after your
14 deposition and before today. So that wouldn't have been your
15 view on the 16th of September, 2008, isn't that right?

16 A. Well, but regardless, the negotiated value was
17 representing the market conditions at that time.

18 Q. At the time, sir, it would have been your view that how
19 the assets were recorded on Lehman's books was not a relevant
20 matter for Barclays. What was relevant was the sales price
21 that was agreed; isn't that correct?

22 A. Relevant for Barclays is the question?

23 Q. Yeah.

24 A. Yes.

25 Q. Now, I'd like to go back to your e-mail, sir, Exhibit M-8

1 where you refer to an extra one billion of comp beyond our
2 accrual, remind you of that clause in your e-mail. Take a
3 look. You see it?

4 Q. Just excuse me for a minute.

5 THE WITNESS: Your Honor, I'd like a bathroom break in
6 a minute, please.

7 THE COURT: Excuse me, what do you need?

8 THE WITNESS: A bathroom break and some water, please?

9 MR. GAFFEY: It's not a bad time for a break.

10 THE COURT: This is fine. We'll take a break and
11 we'll resume at 4 o'clock.

12 MR. GAFFEY: Thank you, Your Honor.

13 (Recess from 3:50 p.m. until 4:00 p.m.)

14 THE COURT: Be seated, please. Mr. Kelly, you can
15 return to the stand.

16 MR. GAFFEY: Thank you, Your Honor. With the Court's
17 permission, Your Honor?

18 THE COURT: Please proceed.

19 RESUME DIRECT EXAMINATION

20 BY MR. GAFFEY:

21 Q. Mr. Kelly, would you take a look, please at Exhibit M-2 in
22 your book?

23 A. Yes.

24 Q. You've seen this document before?

25 A. Yes, I have.

1 Q. Now, this schedule, or versions of this schedule were
2 prepared based on input from a number of people at Lehman, is
3 that correct?

4 A. Yes, that's correct.

5 Q. And among the people at Lehman who were involved were Ian
6 Lowitt, Gerry Reilly, Paolo Tonucci, and Reed Stewart (ph.),
7 the latter of whom worked for you, right?

8 A. Yeah. I believe that's right, yeah.

9 Q. And you played a role in the preparation of this schedule,
10 is that correct, sir?

11 A. Yes, I did.

12 Q. And the schedule is based on data that you collected and
13 supplied in your work around the transaction, correct?

14 A. I think the data was collected by each of the people that
15 you referenced.

16 Q. Okay. And you knew -- and the asset total on this
17 schedule incorporated the five billion dollar all-in economic
18 loss that we were talking about before the recess, is that
19 right, sir?

20 A. I can't talk about this specific version, but I'm very
21 familiar with versions of this. And my recollection is that
22 the asset values on those versions represented the negotiated
23 values.

24 Q. Okay. And by the negotiated value, you mean the one below
25 book value?

1 A. That's correct.

2 Q. Okay. And you said you can't -- you can't comment on this
3 particular version on it. Is that because it has initials on
4 it?

5 A. I don't recall seeing any version with initials until much
6 later.

7 Q. Okay.

8 A. I -- I don't recall the specific numbers on the page as
9 being the final version as of the Tuesday morning, the 16th.

10 Q. Okay, take a look within your book at Exhibit 198. Now,
11 you see that 198, which is in evidence, is an e-mail from James
12 Walker at Barclays Capital to you, cc'd to Chris [Weedler], is
13 that how I pronounce that name?

14 A. [Wideler].

15 Q. Weidler. And it says, "Martin, the attached summary
16 balance sheet was used by the LEH side in the overnight
17 discussions of Monday. I believe Chris Weidler spoke to you
18 earlier. Team are looking for backup details including
19 position-level info to tie into the attached. Thanks, James".
20 Do you see that?

21 A. Yes, I do.

22 Q. Did you receive that e-mail on the 17th of September from
23 Mr. Walker at Barclays Capital?

24 A. I see that, yes.

25 Q. Okay. And attached to that e-mail -- and it's the second

1 page of the exhibit -- is a schedule. Do you see that?

2 A. Yes, I do.

3 Q. Okay, now, I'm going to ask that that schedule be shrunk
4 so that M-2 can be put up next to it so we can see them both on
5 the screen. And comparing that page of Exhibit 198 with the
6 schedule, with the one marked as M-2, that is, the initialed
7 one, you can see, sir, you agree with me that the numbers are
8 identical, is that right?

9 A. Yes, they are.

10 Q. And both documents bear a footer in the lower right-hand
11 corner that says "September 16th, 2008, 11:18 a.m." Do you see
12 that?

13 A. Yes.

14 Q. That's both documents, being Movants' Trial Exhibit 2 and
15 Movant's Trial Exhibit 198, correct?

16 A. Yeah. They're identical.

17 Q. Okay.

18 A. I wasn't following the exhibit numbers, but, yes.

19 Q. So when you were in correspondence with Messrs. Walker and
20 Weidler at Barclays Capital about this schedule, that is, the
21 second page of Exhibit 196 -- well, let me back up. Now that
22 we've agreed the numbers are identical, we agree that the asset
23 side reflects the negotiated values, not book value, correct?

24 A. That's -- that's my recollection, yes.

25 Q. Okay. And the liability side reflects in the section

200

1 marked "comp and cure", that comp amount of two billion dollars
2 reflects the one billion dollars over accrual that you referred
3 to in your early morning e-mail to Messrs. Lowitt and Tonucci,
4 right?

5 A. Well, the two billion represents the amount that I
6 understood had been negotiated as being the comp accrual.

7 Q. Okay. And the negotiated amount for comp accrual shown on
8 that balance sheet was -- when it shows two billion, was one
9 billion over what Lehman had actually accrued for '08 employee
10 expenses in that year, yes?

11 A. Yeah. My understanding was that it was approximately a
12 billion dollars over -- over Lehman's accrual for the year to
13 that point in time.

14 Q. And the cure number that's shown in the liabilities side
15 of this schedule which, on this schedule, is put at two and a
16 quarter billion. You had input into calculating that cure
17 number, did you not?

18 A. I did, at points during the week. At this point in time,
19 on the Monday night/Tuesday morning, I remember discussing it.
20 I don't think I had input into the calculation of it.

21 Q. Okay. But with respect to the comp number, you were aware
22 at the time when you saw this, when this was sent to you by Mr.
23 Walker that, number one, the assets reflected an amount below
24 book value, and the comp liability was one billion over
25 Lehman's marks -- over Lehman's accruals, yes? You knew those

1 two things?

2 A. I want to be clear. I don't recall receiving the e-mail.
3 Apparently I did, from looking at it now. But the way I
4 described the comp is it was a negotiated number.

5 Q. Okay. You don't have any doubt that you received the e-
6 mail from Mr. Walker, correct?

7 A. No, I can see I received it.

8 Q. Okay. You're not surprised to find yourself in
9 correspondence with Mr. Walker over at Barclays Capital during
10 the week of September 15th about matters related to the sale
11 transaction, correct?

12 A. No. We had a number of e-mails.

13 Q. Okay. And it doesn't surprise you to see correspondence
14 with Mr. Walker over at Barclays Capital about the assets that
15 are going to be transferred, correct?

16 A. It does not surprise me.

17 Q. Okay. And would you tell the Court what, if any,
18 discussions you had with Mr. Walker or Mr. Weidler about the
19 fact that this schedule reflected agreed amounts below book
20 value?

21 A. I don't recall having discussions with James Walker or
22 Chris Weidler --

23 Q. Did you have any discussions with anybody on the Barclays
24 side of the table about either this schedule or the provisions
25 of the asset purchase agreement?

1 A. At this point in time, no, not that I recall.

2 Q. And when you differentiate as to at this point in time,
3 are you doing it broadly between your time as a Barclays
4 employee and your time as a Lehman employee?

5 A. I am, and I'm also referring more to the asset purchase
6 agreement than I am to the schedule.

7 Q. Okay. Did there -- after you went over to Barclays, who
8 was your direct superior over there?

9 A. Patrick Clackson.

10 Q. Okay. And did you have some sort of relationship on the
11 organization chart to James Walker when you went over to
12 Barclays?

13 A. I did. I had a couple of different roles, and one of
14 them, I reported to James; and two of them, I was sort of a
15 colleague of James.

16 Q. Okay. And eventually, you took James' job, if I recall
17 correctly, correct?

18 A. He resigned about a year ago.

19 Q. Okay. And you were moved into his position?

20 A. That's correct.

21 Q. Okay. And did you work with Mr. Weidler when you moved
22 over to Barclays?

23 A. Yes, in one of the roles that I mentioned, he was a direct
24 report of me.

25 Q. And in the work you did at Barclays, some of the work you

1 did was to address the nature of Barclays' gain on the
2 transaction, is that correct?

3 A. It was. By the time I started to work at Barclays, that
4 process was well underway. It continued for quite a long time,
5 actually, so yes, I became involved in it, I don't know,
6 around -- I would say around the November time frame.

7 Q. Okay. And once you went to work at Barclays in -- you
8 signed your contract September 25th, so late September, early
9 October 2008, once you went to work there, who did you talk to
10 at Barclays about the fact that the agreed price on the assets
11 transferred under the asset purchase agreement was actually
12 below book value shown on Lehman's books. Did you have that
13 conversation with anybody?

14 A. I think I started to think of myself as a Barclays
15 employee after I signed the contract on October 10. I think at
16 that point in time, I don't think that Lehman's prior book
17 value is relevant to Barclays. What was relevant to them was
18 the price they negotiated. And then the assets would be run
19 through their own pricing processes to reflect current pricing
20 at that point in time.

21 Q. And as far as you know, the assets were run through their
22 own pricing processes after the transaction had closed,
23 correct?

24 A. From what I understand, yes. Ultimately, yes. But I
25 think it was phased in because getting information that they

1 needed to run it through their processes was difficult at a
2 granular enough level. But ultimately, yes, it ran through
3 Barclays' processes.

4 Q. Now, the cure number on that balance sheet, sir, which, on
5 that sheet, is shown at two and a quarter billion dollars,
6 there came a point during the week where you knew that number
7 was going down, is that right?

8 A. Yes, that's right.

9 Q. And you came to understand -- well, you know that it -- by
10 the next morning, the estimate was 1.5 billion, correct?

11 A. No. I'm not familiar -- I don't recall a 1.5 billion
12 dollar estimate.

13 Q. And when -- but when you made -- when you came to
14 understand, during the week of September 15th, that the cure
15 payment was less than had been stated on this document, you
16 knew it came down by at least a billion dollars, is that
17 correct?

18 A. My recollection is it came down to 1.0 billion.

19 Q. Okay. And when you -- and you learned that fact because
20 you and Mr. Lowitt, the CFO, had reviewed various data and
21 determined that the liability estimate was overstated, correct?

22 A. I think -- I think a few things are relevant. One is, the
23 concept of cure was something that was new, and certainly new
24 to me, new to many on the Monday night/Tuesday morning. And so
25 there was a long discussion to understand what cure meant and

1 how people could dimension what the potential liability might
2 be. I also recall a conversation on the -- in the early
3 morning of the 16th with Mark Shapiro from Lehman whereby I had
4 an understanding that the contract had an adjustment mechanism
5 in it whereby, if you like, the purchase price would be
6 adjusted to reflect actual liabilities assumed versus the
7 estimate that was made.

8 So two things happened subsequent to that, and I would
9 estimate that they happened around the Tuesday/Wednesday time
10 frame. One was I became aware of the fact that there was not
11 adjustment mechanism. And two, I became -- it may have been
12 myself, it may have been me with Ian, but as we were going
13 through versions of a balance sheet -- spreadsheet that looks
14 like this in this type of format, either I or Ian or both of us
15 made an observation that the cure looked high relative to the
16 funds-expense run rate. And so either I or Ian and I made a
17 determination that in the absence of having a contract by
18 contract buildup which work had started but it was a long and
19 complex process, we had to come up with an estimate, and we
20 based an estimate off the funds run rate. And the estimate
21 that we used was one quarter's worth of nonpersonal expenses
22 for the firm as a reasonable proxy for what the cure liability
23 might be, having spent time thinking about all of the uncertain
24 aspects of cure.

25 We then had a conversation with Bart to reflect both of

1 those understandings -- there was no adjustment mechanism,
2 which he knew -- and to suggest an alternative way of
3 estimating the liability. His -- his comment, his reaction to
4 that was we just left a billion dollars on the table.

5 Q. Is that what he said?

6 A. Words to that effect. It may have been those exact words.
7 And then subsequent to that, either -- either directly or
8 indirectly, I communicated that to my team who were then
9 working on versions of a balance sheet to estimate the impact
10 of the transaction to Lehman and to Lehman's books and records.
11 And so versions of that spreadsheet were then used and sent to
12 people both inside and outside the firm.

13 Q. And this knowledge that you gained during the week about
14 once you took a closer look at the run rate that the estimation
15 for cure was overstated by as much as a billion dollars, and
16 then the conversation that you described -- the work you did
17 with Mr. Lowitt and the conversation you described with Mr.
18 McDade, did all of that take place before Friday, September
19 19th?

20 A. Yeah. I think it took place on the Tuesday and Wednesday.
21 I can't precisely pinpoint it, but that's my -- that's what
22 I --

23 Q. Can you pinpoint whether it was Tuesday or Wednesday? Was
24 it the day you learned about the deal, which would be the
25 Tuesday?

1 A. I can't pinpoint. It may have been during the day on
2 Tuesday, later, after the early morning. It may have been
3 Wednesday.

4 Q. So on either Tuesday, September 16th or Wednesday,
5 September 17th, you learned and spoke to Mr. Lowitt and Mr.
6 McDade about the fact that the estimate for cure was overstated
7 by a billion dollars. Is that correct?

8 A. Yeah, the conversation was along the lines of a revised
9 estimate would be one billion dollars. So the initial estimate
10 had to come down.

11 Q. Do you know if anyone ever told any of the lawyers
12 representing Lehman about that conversation?

13 A. It was included on a version of an estimated balance
14 sheet, and that was sent to -- versions of that spreadsheet
15 were being sent to people including Lehman's lawyers.

16 Q. Sir, the fact of the matter is, you've seen one version of
17 that example of the spreadsheet you're talking about, isn't
18 that right? You talk about it as if there's a bunch of them.
19 You've only actually ever seen one, right?

20 A. No, I've seen more than one version.

21 Q. Okay. And you saw them while you were preparing for your
22 testimony, right?

23 A. Well, I -- yeah, I saw them, yes, I saw them as I was
24 preparing.

25 Q. When you had your deposition taken, did you have a memory

1 that you had shared records of transaction adjustments with
2 lawyers?

3 A. I recall -- there was an e-mail that I had sent to Weil
4 with an attachment with a version of the spreadsheet on it. I
5 did not recall sending the e-mail. But the e-mail suggested
6 that I did. I do recall a conversation with Weil about the
7 cure estimate Friday morning and around the fact that the
8 estimate had changed throughout the course of the week.

9 Q. And did you write anything about this conversation with
10 Weil?

11 A. Did I write anything?

12 Q. Yeah.

13 A. No. No.

14 Q. And when did you first recall this conversation with Weil?

15 A. My recollection was it was --

16 Q. No, I'm not asking when it happened, sir. I'm asking you
17 when you first recalled that it happened.

18 A. When did I first recall it?

19 Q. Yeah, is this something else you remembered about six
20 months ago?

21 A. No, I don't believe so.

22 Q. Now, let me show you tab M-32 in your book. Are you
23 there, sir?

24 A. Yes, I am.

25 Q. That's Exhibit Movant's 32 in evidence. Do you recognize

1 the document?

2 A. The attachment?

3 Q. Well, the whole thing. It's an e-mail to you.

4 A. I don't recall receiving the e-mail.

5 Q. Do you know Bryan Young?

6 A. I recognize the name. I don't recall what he did, but
7 he's referring to a woman by the name of Rose, who I'm pretty
8 sure is Rose Hausenberg (ph.).

9 Q. Okay.

10 A. Rose worked indirectly for me.

11 Q. And if you take a look, sir, at the third page of the
12 document -- first of all, tell us what the attachment is.

13 A. The attachment is -- is an attempt to project at different
14 points in time what the impact of the sale transaction to
15 Barclays would be on the books of Lehman. And as -- so the
16 format is, start with what we thought the balance sheet was in
17 that column labeled 9/17. The balance sheet wasn't perfect and
18 accurate. You can see it doesn't actually balance. And that's
19 because there was no general ledger mid-month. So you can see
20 notes columns which indicate where some of the numbers came
21 from. And then there was a -- a column labeled transaction
22 adjustments, and then there's a label -- a column labeled
23 balance sheet transfer to get to remaining balance sheet post
24 the transaction.

25 Q. And reading across from left to right -- as opposed to

1 looking for a balance bottom line -- leaving across from left
2 to right, sir, on the item for compensation payable, it starts
3 in the September 17th column at 520 million, is that right?

4 A. Yes.

5 Q. And there's a transaction adjustment of a billion,
6 correct.

7 A. I can see that, but I don't recognize the number.

8 Q. Well, you see that it's a billion dollar transaction
9 adjustment?

10 A. Yes, I do.

11 Q. And you see that that transaction adjustment brings the
12 number for compensation payable into the range of one and a
13 half billion, correct?

14 A. I can see that on this page, yes.

15 Q. All right, and apart from demonstrating that we're both
16 literate, sir, can you give me an explanation for why it is
17 that upward adjustment of a billion dollars is being made at
18 that point?

19 A. Well, this is an attempt to project the terms of the sales
20 contract -- sorry, to project the impact of the sale contract
21 to Lehman. The difficulty I have looking at this, the
22 compensation liability line, here, is that I don't recognize
23 the final number, the 1.25 billion. In my mind, it was always
24 2.0 billion from the Monday night, and in my mind, that number
25 never changed.

1 Q. Well, take a look at the trade payable line below that.
2 You'll see a transaction adjustment there adjusting from 400
3 million as of 9/17 with an upward adjustment of 383 million
4 bringing you to a total of 783 as balance sheet transfer. Did
5 that number move around during the week?

6 A. Well, that's the number we spoke about previously.

7 Q. The cure?

8 A. Well, trade liabilities were a component of cure, and I
9 think that it was put against this line because it was a
10 placeholder for that. It was a place to put it. The number --
11 my recollection is that the final number, the final estimate
12 for cure, changed from 2.25 billion to 1.0 billion. I don't
13 recall any other estimates for cure throughout the course of
14 that week.

15 Q. As a matter of understanding this document itself, is it
16 correct to say, sir, that the column for 9/17 reflects what
17 Lehman's books actually showed, and the transaction adjustments
18 are to make it agree with the purchase agreement. Is that
19 right?

20 A. Well, not entirely because the 9/17 column is compiled
21 from a number of different sources. So as a starting point, I
22 know that that's not from the general ledger because it doesn't
23 balance. A general ledger always balances. So you can see at
24 the bottom of -- of the last page, there's an out-of-balance
25 amount of 1.5 million dollars, negative.

1 Q. Let me try this another way. The transaction adjustment
2 has no basis other than the fact that it's an adjustment to
3 reflect the purchase agreement, correct?

4 A. Yeah. It's a -- it's an adjustment to reflect the terms
5 of the purchase agreement, but recognizing that the opening
6 balances are not entirely reliable and the opening balances
7 represent those only for this entity, LBI.

8 Q. Well, take a look, sir, if you would, at Exhibit M-17.

9 MR. GAFFEY: Your Honor, I think there may be an
10 objection to this. Maybe my friend, Mr. Schiller, could let me
11 know if that objection's been withdrawn as well?

12 THE COURT: Is there an objection to Exhibit 17?

13 MR. SCHILLER: Checking the list, Your Honor. We do
14 not have an objection to it; we do not, Your Honor.

15 THE COURT: Fine. So this is now on the admitted
16 column.

17 MR. GAFFEY: I -- we'll -- yes, Your Honor. Thank
18 you.

19 THE COURT: Fine.

20 Q. M-17, sir, there's some handwriting. And first I want to
21 know if the handwriting is yours. It's starting at about the
22 third page. Is that your handwriting?

23 A. Yes, that's my handwriting.

24 Q. And are these notes that you made during the course of
25 your work around the transaction during that week?

1 A. It's certainly around the course of the transaction
2 because it's in the same format.

3 Q. Well, directing your attention, sir, to Bates page 115129,
4 which is the fourth page of the document, does that page bear
5 your handwriting?

6 A. Yes, that's mine.

7 Q. Okay, now, you recall the document we looked at a moment
8 ago that had a 15 -- a 1.5 billion dollar item for bonus
9 payable, and this is now changed to 2 billion.

10 A. Yes.

11 Q. Is that your handwriting changing it to two billion?

12 A. Yes.

13 Q. And on this one, trade liabilities are shown at one
14 billion with a transaction adjust at 286. Do you see that? Do
15 you have any explanation for that?

16 A. Well, I think the billion dollars in the last column there
17 is a number I do recognize and I do recall. So that's
18 consistent with where I recall the estimate moving to. The
19 difference to get there adjusts for the fact that we're looking
20 at the ledger, or we're looking at a version of a balance sheet
21 for an entity called Lehman Brothers, Inc. --

22 Q. Okay.

23 A. -- whereas cure was a border concept on that.

24 Q. And while I'm in that neighborhood in the book, sir, would
25 you take a look at tab M-15?

1 MR. GAFFEY: And again, I'd ask the same question,
2 Your Honor. My notes reflect an objection. I don't know if
3 there actually is one.

4 MR. SCHILLER: No, no objection, Your Honor.

5 MR. GAFFEY: Thank you, Your Honor.

6 Q. Do you recognize the handwriting on that document?

7 A. Yeah, this is not my handwriting.

8 Q. Do you recognize it to be Ian Lowitt's handwriting?

9 A. I do believe it's Ian's handwriting.

10 Q. You recognize this to be Ian Lowitt's handwriting making
11 adjustments off a version of the balance sheet that we looked
12 at before?

13 A. Well, yeah, but the total assets on the prior version were
14 not seventy-seven. They were --

15 Q. No, they weren't, sir. The total assets on the prior
16 version were seventy-two: five billion dollar difference. So
17 my question, sir, is do you recall -- do you recognize these to
18 be the handwritten notes of Ian Lowitt addressing a balance
19 sheet showing a seventy-seven billion dollar asset value? Just
20 above the word "mark-down", there, sir.

21 A. Yeah. I can see that. I can see seventy-seven, and it's
22 Ian's handwriting.

23 Q. And do you recognize Mr. Lowitt's handwriting where the
24 word "mark-down" is written?

25 A. I can see the words "mark-down". I -- I -- I don't know

1 if that's Ian's.

2 Q. Okay.

3 A. I presume it is.

4 Q. And over by the cure and comp section, which is what we
5 were talking about, sir, is that his handwriting next to the
6 cure and comp items that stay at 2.25 and 2.0?

7 A. I think all the numerical notations are Ian's.

8 Q. Okay. And in the course of your work around the
9 transaction, did you see versions like this of the balance
10 sheet we looked at before that had an additional adjustment
11 column on them?

12 A. Yeah. I may have. I don't have a specific recollection,
13 but I may have.

14 Q. Okay.

15 MR. GAFFEY: If may just have a moment, Your Honor,
16 I've lost my place in my outline.

17 THE COURT: No problem. Take your time.

18 MR. GAFFEY: Thank you. Your Honor, may I approach
19 with -- I have an original exhibit here.

20 THE COURT: You may approach. Thanks.

21 Q. Mr. Kelly, I've given you a copy of what we've marked as
22 Exhibit -- Movant's Trial Exhibit 254. I'm not particularly
23 concerned about the e-mail on the front, sir, but I would ask
24 you if you would look through these versions of the balance
25 sheet that we've been talking about and tell me if these are or

1 are similar to the versions that you saw in your work around
2 the transaction that week. Let me rephrase. Is this the type
3 of balance sheet that you saw over the course of your work that
4 led to the September 16th balance sheet we saw before?

5 A. Well, I think -- it looks like most of these are after the
6 16th. They've all got a time stamp that's 9/18 on the bottom.

7 Q. If I were to represent to you, sir, that that's the date
8 it was printed for this particular version --

9 A. I think I recall seeing versions where there was an
10 adjusted column -- printed versions where there was a --

11 Q. Okay.

12 A. -- so there was per contract estimate and then a different
13 set of numbers next to it. What I'm not sure I can do is put
14 them in sequence.

15 Q. Well, let's try it this way. Take a look at page 3 of the
16 collection of documents there. You have the balance sheet
17 found at page 3?

18 A. Yes.

19 Q. And it's got an annotation at the bottom that says "BS5,
20 final, Tuesday morning", do you see that?

21 A. Yes.

22 Q. And you recognize the numbers on there to be the same as
23 what we talked about before in Exhibit 2, that is the final --
24 it's got that 72.65 number -- data?

25 A. Yes.

1 Q. Okay. So working from that with that as the final, do you
2 recall seeing these other variations or documents like them
3 that were variations on this schedule, the final schedule that
4 showed the 72.65?

5 A. I have a recollection of seeing different versions of it.

6 Q. Were they versions like the ones before you?

7 A. I do recall seeing -- well, there's two different formats
8 here. One format has two columns next to which, asset and
9 liability. I think I do recall seeing versions that looked
10 like that. But I think I need to ask you a question again.
11 Did you ask if this was before the final version? Or --

12 Q. Are these versions of the spreadsheet that you saw around
13 the time of your work on Movant's Exhibit 2, the final?

14 A. I can't -- I can't place them in sequence in order. So I
15 just don't know if they were before or after that version.

16 Q. You saw versions like this, though, right, with different
17 numbers on them?

18 A. Yes, yeah.

19 MR. GAFFEY: Can I consult for one second, Your Honor?

20 (Pause)

21 MR. GAFFEY: Your Honor, again, I'm confused by what
22 I -- is there an objection to this document? If there is, I'm
23 going to try to move it in, and if there's not, I can move onto
24 another topic.

25 MR. SCHILLER: No objection, Your Honor.

1 MR. GAFFEY: Thank you, Your Honor.

2 THE COURT: It's in.

3 (Movants' Exhibit 254, versions of balance sheets, was hereby
4 received into evidence as of this date.)

5 Q. Now, Mr. Kelly, during the week of September 15th, did you
6 become aware of the fact that a repurchase agreement between
7 Lehman and Barclays had come to play a role in the sales
8 transaction?

9 A. A repurchase agreement?

10 Q. Yes.

11 A. I was aware that there was a repurchase agreement, yes, at
12 some point then.

13 Q. And you had conversations with Mr. Lowitt and Mr. Tonucci
14 about the repurchase agreement, correct?

15 A. Yeah, my recollection is I became aware of it through
16 either or both of Paolo and Ian.

17 Q. Okay. And did you have -- you became aware that the repo
18 somehow became involved in connection with the closing of the
19 Lehman Barclays sale transaction, is that right?

20 A. I'd say I became aware of it as a component of the
21 transaction. How it fit in, I didn't know.

22 Q. Do you recall that there were conversations around the
23 time, there were discussions around that time concerning a
24 possible default on the repo?

25 A. No, I don't recall that.

1 Q. Well, do you recall conversations about a possible default
2 on the repo although you might not be aware of who the parties
3 to the repo were?

4 A. I don't think so.

5 Q. You have any recollection that you heard Mr. Lowitt and
6 Mr. Tonucci engaged in conversations about a possible default
7 on a repo?

8 A. It's possible, but I don't think so. I think I just
9 became aware that there would be a repo as part of the
10 settlement transaction.

11 Q. Would you turn, in your binder, sir, to Exhibit M-188?
12 And first I direct your attention, sir, to the addressees at
13 the top of this e-mail chain which shows from Paolo Tonucci to
14 Ian Lowitt, Michael Gelband, cc: Martin Kelly. Do you see
15 that?

16 A. Yes, I do.

17 Q. Did you receive this e-mail from Mr. Tonucci?

18 A. I don't recall receiving it, but evidently I did, looking
19 at this.

20 Q. You have no reason to doubt that you received it, correct?

21 A. That's correct.

22 Q. And it was the normal course of business of Lehman to
23 communicate with your coworkers and your superior by e-mail?

24 A. Well, it was a method of communicating.

25 Q. Normal course to send e-mails to coworkers, yes?

1 A. Yeah. E-mails, calls, meetings.

2 Q. And this e-mail was sent in connection with Lehman
3 business, as far as you can see by reading it, correct?

4 A. Yes.

5 MR. GAFFEY: Your Honor, I move Exhibit M-188 into
6 evidence.

7 MR. SCHILLER: No objection, Your Honor.

8 THE COURT: This is admitted.

9 (Movants' Exhibit 188, e-mail From Paolo Tonucci to Ian Lowitt,
10 Michael Gelband and Martin Kelly, was hereby received into
11 evidence as of this date.)

12 MR. GAFFEY: It's admitted, Your Honor?

13 THE COURT: It's admitted, yes.

14 MR. GAFFEY: Thank you.

15 Q. Now, at the bottom of that e-mail chain, Mr. Kelly,
16 there's an e-mail from Gerry Reilly dated September 18th, 2008
17 entitled "Open issues on the deal". It's to Ian Lowitt,
18 Michael Gelband and with copies to Paolo Tonucci and to you.
19 Do you see that?

20 A. Yes, I do.

21 Q. And do you see that Mr. Reilly writes in item 3 in his
22 list of three things, "Not clear on the amount of block
23 discount or how we make it happen. Defaulting on repo could be
24 the best as discount could be taken from haircut. If not then,
25 we need to give business an allocation of block discount so

1 they can mark down the books tonight. Does that create a
2 problem as it could tip the broker early? Would we rather have
3 that be in the sale price tomorrow?" Do you see that?

4 A. Yes, I do.

5 Q. Does that refresh your recollection as to whether you were
6 aware of conversations or communications concerning a default
7 on the repo?

8 A. No, it does not.

9 Q. Do you recall any communications with Mr. Lowitt, your
10 superior, or Mr. Tonucci, your coworker, about defaulting on
11 the repo as a means of delivering a block discount?

12 A. No, I do not.

13 Q. Did you understand this at the time to be a reference to
14 the block discount that was represented by the five billion
15 dollar all-in economic loss you learned about on Tuesday
16 morning?

17 A. I don't -- I don't recall the -- the term block discount
18 doesn't mean anything to me in the context of the transaction.

19 Q. You don't understand that to mean a discount on a big
20 bunch of assets, sir? Block discount?

21 A. Well, a block discount, yes. If you --

22 Q. Okay.

23 A. It was not a term that I was familiar with or using that
24 way.

25 Q. And your understanding of a five billion dollar all-in

1 economic loss on the large body of assets being transferred
2 from Lehman to Barclays would, under that definition,
3 constitute a block discount, wouldn't it?

4 A. No, I don't think so. No, I think the -- in my mind, the
5 five billion dollar amount that we referenced before was the
6 difference between where the prices had been agreed to and the
7 book values.

8 Q. Well, do you have any explanation, sir, for why Mr. Reilly
9 is writing to Lowitt, Gelband, Tonucci, and Martin Kelly asking
10 for help resolving some issues, which is how he introduces his
11 e-mail, and saying, "It's not clear on the amount of block
12 discount or how we make it happen." Do you have any
13 explanation for that, sir?

14 A. The explanation, I think, for me being included on the
15 e-mail, as I sit here today, is -- is that he wanted to keep me
16 informed of issues that he was working on.

17 Q. Any particular reason he'd keep you informed on a block
18 discount or defaulting on a repo, sir?

19 A. We were all trying to keep each other informed as the week
20 progressed. There was a lot happening and a lot changing. And
21 it doesn't surprise me that he's copied me on the e-mail.

22 Q. Well, let's look at the second item of Mr. Riley's three
23 items. No. Item number 2 in the bottom e-mail. There we go.
24 Looks like we have PB Financing balances left in LBI and
25 according to Cogs, they do not want it. What does it mean to

1 leave it behind? Do you see that?

2 A. Yes.

3 Q. You recognize Cogs to be a reference to John Coughlin
4 (ph.)?

5 A. Yes.

6 Q. And do you have any idea what Mr. Reilly is talking about
7 when he talks about PB Financing balances?

8 A. PB would stand for Prime Brokerage.

9 Q. Okay. Does that have anything to do with your end of the
10 world at Lehman?

11 A. Well, anything to do with my end of the world -- I think
12 Prime Brokerage was a business that --

13 Q. Did it report up to you?

14 A. No, it didn't. It was a business that Gerry supported as
15 the prime comptroller. I think --

16 Q. Did you work with Cogs?

17 A. Did I work with Cogs?

18 Q. Yes.

19 A. Not in -- I don't think in the period I was the financial
20 comptroller I worked with him.

21 Q. So I guess my question's the same. Can you think of a
22 reason Mr. Reilly would be including you in an e-mail about
23 this topic?

24 A. I -- as I said, I think he's trying to keep me informed of
25 issues that he's working on. And Prime -- Prime Balancing --

1 sorry, Prime Brokerage Financing is a reference to repos and
2 reverse repos. That -- that was a component of the transaction
3 earlier in the week.

4 Q. And then in the first paragraph, number 1 there, it says
5 "Auction Rate Book." "We've been making the assumption that
6 this is going. I'm not sure BarCap knows that and assume there
7 could be no auction process and instead can we leave it
8 behind?" Do you see that?

9 A. Yes, I do.

10 Q. Any particular reason Mr. Reilly would be writing to you,
11 sir, about ARS coming or going in the transaction?

12 A. I -- I think for the same reason.

13 Q. So of the three candidates there, sir, isn't it most
14 likely that Mr. Reilly's writing to you about the block
15 discount and defaulting on a repo as a means of delivering it,
16 because you're the guy who knew and told him about the five
17 billion dollar overall economic loss versus Lehman's marks?

18 A. No, I -- I updated him on a conversation I recall we'd all
19 had earlier that -- that morning, so I don't think I told him
20 about it. I think I was informing him that it had not changed.
21 Ultimately, any process to reflect the transaction on the books
22 and -- and the inventory balances would be undertaken by Gerry
23 and his team.

24 Q. As you sit here today, sir, do you have any recollection
25 of sending an e-mail or walking down to the office of or

1 getting on the telephone with Gerry Reilly and saying in sum or
2 substance, "What block discount?"

3 A. No, I don't.

4 Q. "What repo default?"

5 A. No, I don't.

6 Q. Were you curious why he was writing to you about that
7 topic?

8 A. I -- I don't recall receiving the e-mail.

9 Q. You did ultimately know though, sir, that -- what you did
10 at the time, sir, understand the term haircut when used in
11 connection with a repo, yes?

12 A. Yes. Haircut is a -- is a general term for -- for any
13 repo contract.

14 Q. You understood it to be the difference between the amount
15 of financing provided under the repo and the market value of
16 the securities under the repo, yes? That was the haircut?

17 A. That's how you haircut on a repo, yes.

18 Q. And you did come to understand at the time, sir, that
19 defaulting on a repo was used as a means of settling the
20 contract between Leman and Barclays? Is that correct?

21 A. No, I do not have that understanding.

22 Q. You didn't learn that at the time?

23 A. No, I did not.

24 Q. Would you turn to page 177 of your deposition? At page
25 177, sir, starting at line 5 and reading through line 19. And

1 line 5:

2 "Q. Did you ever learn whether defaulting on a repo was used
3 as a means of settling the contract between Lehman and Barclays
4 at any time? Did you ever learn that at any time?

5 "A. Until what point in time?

6 "Q. Two seconds ago, up 'til the present? Apart from anything
7 you've learned from your lawyers?

8 "A. I understand that that was the mechanism, defaulting on
9 the repo was the mechanism.

10 "Q. And how did you come to have the understanding that
11 defaulting on the repo was the mechanism?

12 "A. I don't know."

13 And my question to you, sir, is as you sit here now, do
14 you remember that you came to understand that defaulting on the
15 repo was a mechanism for settling the contract between Lehman
16 and Barclays, having read that deposition testimony?

17 A. I'm sorry. The question is how I came to learn?

18 Q. Did you?

19 A. Did I come to learn?

20 Q. I know the answer to how, sir, is "I don't know." I just
21 read it. The question is did you come to understand that a
22 default on the repo was used as a mechanism of settling the
23 contract between Lehman and Barclays?

24 A. I'm actually not sure. I don't know if that ultimately
25 was -- was part of the transaction.

1 Q. Sir, when I asked you at your deposition, "Did you ever
2 learn whether defaulting on a repo was used as a means to
3 settle the contract between Lehman and Barclays" and you said,
4 "I understand that that was the mechanism, defaulting on the
5 repo was the mechanism", did you know then that defaulting on
6 the repo was a mechanism that was used to settle the contract
7 between Lehman and Barclays?

8 A. I don't recall, looking at the words, presumably I did.

9 Q. Do you recall that you were -- well, when you gave me that
10 answer at the deposition, sir, were you being truthful?

11 A. I was -- yes, I was.

12 Q. You were giving me your best memory at the time, weren't
13 you?

14 A. Yes. Yes, I was.

15 Q. And more time has passed since then, yes?

16 A. That's correct.

17 Q. And you'd agree with me your memory would have been better
18 closer to the event than now, correct?

19 A. Yes, probably.

20 Q. All right. So having said at your deposition, "I
21 understand that that was the mechanism, defaulting on the repo
22 was the mechanism," let me ask you again. Did you come to
23 understand that defaulting on the repurchase agreement was a
24 mechanism -- was used to settle the contract between Lehman and
25 Barclays?

1 A. I -- I don't know that for sure.

2 Q. Well. There did come a time when you learned what was
3 exchanged between Barclays and Lehman as a result of the
4 default on the repo, correct?

5 A. No, I -- I'm not sure. I think that's related to the
6 prior question, I'm not sure -- I'm not sure I did.

7 Q. Well, you learned it when you became a Barclays employee
8 at least, right?

9 A. Well, I learned that assets had come in to Barclays and --
10 and liabilities had been assumed. I -- I don't know, sitting
11 here now, I don't know if defaulting on a repo was the method
12 of effecting the transaction.

13 Q. You learned what was exchanged through the repo? After
14 you got to Barclays, is the question, sir.

15 A. Yeah, I think that's true.

16 Q. And you learned that from conversations with James Walker
17 and Gary Romain, is that right?

18 A. Yeah. Pro -- Gary, maybe Patrick. I'm not sure about
19 James.

20 Q. Could you turn to tab M-21 in your book? Are you there,
21 sir?

22 A. Yes, I am.

23 Q. This is Movants' Exhibit 21 and I point out to you, sir,
24 it appears to be an e-mail from Gerard Reilly to you, dated
25 September 17th, 2008, entitled "Due diligence items". Did you

1 receive this e-mail from Mr. Reilly?

2 A. Again. I don't recall receiving this, but -- but I don't
3 have reason to doubt that, looking at this.

4 Q. You don't have any reason to doubt that this is a genuine
5 e-mail that Mr. Reilly sent to you in the course of business,
6 correct?

7 A. Correct.

8 Q. And this is the type of e-mail you would receive from time
9 to time from Mr. Reilly in the course of your business with
10 Lehman, correct?

11 A. Well, I'm not sure about the type, but I receive ma --
12 many e-mails from Gerry and -- and others on this, too.

13 Q. You were working on due diligence items at the time,
14 weren't you, sir?

15 A. I was working on the tra -- transaction was one of the
16 things I was working on at this time.

17 MR. GAFFEY: Your Honor, if it's not already in, and
18 again, I apologize for the confusion, I move the admission of
19 Exhibit M-21.

20 THE COURT: Is there an objection?

21 MR. SCHILLER: No, there is not, Your Honor.

22 THE COURT: Good, well, it's in again.

23 (Movants' Exhibit M-21, e-mail from Gerard Reilly to Mr. Kelly
24 dated 9/17/08, was hereby received into evidence as of this
25 date.)

1 BY MR. GAFFEY:

2 Q. Now, I asked you before, Mr. Kelly, if you hadn't been
3 involved in calculating a gain to Barclays as a result of the
4 transaction at a time when you still were a Lehman employee.
5 Do you recall that?

6 A. Yes, I do.

7 Q. And I showed you some notes that reflected your adding up
8 a total of 52.8. Do you recall that?

9 Let's -- you know, rather than do that, let's put the
10 document back in front of you, Exhibit M-235.

11 A. I have the exhibit. So what's the number, please?

12 Q. Are you at M-235, sir? And would you turn to page 115145,
13 of that exhibit? It's the one with your handwritten notes down
14 the right-hand side.

15 A. Right.

16 Q. Okay. We talked about this one a bit before. This is
17 where the word "Brett" is at the top? See that?

18 A. Yes.

19 Q. And the number 52.8 is calculated in your handwriting?

20 A. Yes.

21 Q. And I asked you, I believe, before whether this
22 represented calculations and work that you were doing in
23 connection with preparing an opening day balance sheet that
24 reflected equity for Barclays as a result of the transaction.

25 Do you recall that?

1 A. I recall the question, yes.

2 Q. Okay. And as you -- at the moment, sir, do you recall
3 working on a balance sheet, an opening day balance sheet for
4 Barclays?

5 A. No, I was not working on a -- on an opening day balance
6 sheet for Barclays. I was working on a closing day balance
7 sheet for Lehman.

8 Q. Would you take a look at page M -- at Movants' Exhibit M-
9 74, please?

10 A. Okay.

11 Q. You with me in your book, sir?

12 A. Yes.

13 Q. Okay. And that -- that's Exhibit Movants' 74 which is in
14 evidence, Mr. Kelly. And you see that it's an e-mail to, among
15 others, Gary Romain at Barclays capital, James Walker at
16 Barclays Capital, T.J. Givenda at Barclays Capital. Those are
17 all men that when I asked you before who you'd come to know at
18 Barclays, you identified for me?

19 A. That I --

20 Q. Do you recognize the names of those men?

21 A. Yes, I do.

22 Q. And is the CC to you and Paolo Tonucci and Gerard Reilly
23 and Brett Beldner (ph.) and Ian Lowitt. Do you see that?

24 A. Yes.

25 Q. Okay. And the Brett Beldner referred to in this e-mail is

1 the same Brett you were referring to in your handwritten notes,
2 is that right?

3 A. I believe so; I don't know any other Brett.

4 Q. Okay. Now I'm going to ask you to compare -- and we'll
5 put them both up on the screen for you, sir -- well, first, is
6 there a reason you are receiving a copy of an opening balance
7 sheet from Robert Asrad (ph.) that's addressed to Barclays
8 executives on the 21st of September, before the closing?

9 A. Well, I think -- I think there's -- there's some symmetry
10 to an analysis if -- if -- if there's a set of assets that
11 Lehman's selling, then the other side of that is -- is those
12 same assets that Barclays is acquiring. So, I think, sitting
13 here today, I think this is another version of an estimate, of
14 assets and liabilities moving and -- and -- and intended to
15 represent -- represent the negotiated values.

16 So how Barclays used this for their own accounting and
17 specifically to your question for purposes of calculating any
18 opening impacts, I -- I -- I did not know that time.

19 Q. My question goes to a slightly different point, Mr. Kelly.
20 I think you told us before the recess that you had not worked
21 on an opening balance sheet while employed at Lehman, you had
22 not worked on an opening balance sheet that reflected equity
23 for Barclays. Am I remembering your testimony correctly?

24 Let me just ask you the question again. While you were
25 employed by Lehman, did you work on an opening balance sheet

1 that showed equity for Barclays as a result of the transaction?

2 A. From the perspective of Barclays and in terms of how
3 Barclays would account for it, no. To the extent that
4 information was the same on both sides and it was relevant to
5 Lehman and may also be relevant to Barclays, then -- yes, to
6 some degree.

7 Q. Well, let's take a look -- I'm not sure I understand that
8 answer from you, sir. Let's take a look at the second page of
9 Exhibit 74. Now, based on the answer you just gave me, is this
10 what you call from Barclays' perspective or is this what you
11 call from Lehman's perspective or this seen from both sides?

12 A. I think this is information prepared by Lehman, because
13 it's come from Robert Asrad who was a -- a Lehman guy. It --
14 represents, I think, what was our understanding of the
15 transaction at that point in time. Well, his un -- I should
16 say his understanding of the transaction at that point in time.
17 I can understand how Barclays would use this information as
18 part of their opening balance sheet process, but how exactly
19 Barclays accounted for each of these components as part of an
20 opening sheet, I don't know. If the question did you
21 participate in preparing an opening balance sheet --

22 Q. Let me make my question a little simpler. Did you
23 participate in preparing this document?

24 A. I don't recall it, but it's certainly possible.

25 Q. Okay. Let's take a look at Exhibit 235. You might want

1 to, as I said before, keep your finger by M-74, but let's look
2 at 235, a hand-written note, and again go back to page 115145.
3 Okay, and I'm going to ask that we highlight the right hand
4 side there with your hand-written notes, starting with Brett as
5 of September 20. Do you see that, sir?

6 A. Yes.

7 Q. Okay. And now I'm going to ask that we put up on the
8 screen the items in the opening day balance sheet within
9 Exhibit M-74, and compare the two. All right, now you see that
10 they both, sir, come to -- both your hand-written notes and the
11 opening day balance sheet both come to a total of 52.8,
12 roughly?

13 A. Yes, I do.

14 Q. And the inventory numbers are roughly the same as you go
15 down, 29, 8.8., 3.1, 3.186, and 95 and 80. Do you see those
16 similar but not exactly identical numbers there?

17 A. Yes.

18 Q. Okay. And there was also an accounting on your notes if
19 we can broaden that out a little bit, move it the left. Okay.

20 Now, looking at the notes in Exhibit 235, sir, and
21 comparing them to the entries in Exhibit 74, does that tell you
22 that you were working with Brett, one of the addresses of the
23 opening balance sheet, on September 20th -- now you were
24 working on the document marked as Exhibit M-74?

25 A. I agree there's a -- a close correlation between my hand-

1 written notes and the typed schedule. So it seems that the
2 notes that I'd written were translated into this type-written
3 schedule known as M-74.

4 Q. And do you have any idea, sir, why the notes that you had
5 written were translated into this typewritten schedule and sent
6 to Gary Romain and James Walker and T.J. Givenda before the
7 closing?

8 A. I think it's likely that they asked for the latest version
9 of the assets and liabilities moving.

10 Q. Okay. And the latest version as of the 20th of September
11 had the assets worth 44.88 billion, correct?

12 A. Looking at this schedule, yes.

13 Q. Okay, according to that schedule? And then there was an
14 item for 15c3 lockup release valued on this schedule at about a
15 billion?

16 A. Yes.

17 Q. Did you ever find out what the number was for the 15c3
18 item that was identified in connection with the transaction?

19 A. Yeah, subsequently. It was 769 million dollars.

20 Q. You actually did a little work trying to figure that out,
21 find out where that was and get it added to the assets that
22 were being sent over to Barclays, right?

23 A. I did some work with its end to estimate what the 15c3
24 requirement was.

25 Q. Okay. And down on the liability path there's a reference

1 to the accrued bonuses, and that's at that two billion we've
2 talked about, right? See that?

3 A. Yes.

4 Q. And it says "assumed to be all accrued". Any explanation
5 for what that means?

6 A. I don't know for sure. I think it's referring to an --
7 that the fact that is an estimate of the actual liability that
8 Barclays would issue.

9 Q. And the cure payments, which are put here at two and a
10 quarter, the number on that original balance sheet you worked
11 on, there's a parenthetical there that says "placeholder for
12 actual accrual". Do you see that?

13 A. Yes.

14 Q. Now, in this correspondence between Lehman personnel and
15 Barclays personnel that refers to a placeholder for actual
16 accrual, did you know at the time that there was a difference
17 between what was shown on the schedule and the actual accrual
18 for cure payments?

19 A. At this time, if this is on Sunday the 21st, I'm not aware
20 of an estimate for an actual accrual. As I explained before, I
21 think cure is a broad concept. I don't think the workup of all
22 the contracts that might go into that had been completed at
23 this stage.

24 Q. A large component of that number was just because those
25 were the numbers that agreed with the purchase agreement, isn't

1 that right?

2 A. I'm not sure. The 2.25 is the number I recognize from
3 the --

4 Q. Well, take a look at --

5 A. -- Monday night

6 Q. -- Exhibit 236, sir. Now, 236 contains correspondence
7 from you to James Walker at Barclays and Gary Romain, with a
8 copy to Gerry Reilly. Were you writing to Reilly to keep him
9 apprised of what you were working on?

10 A. I would imagine so, yeah.

11 Q. Okay. And it's entitled "Assets and Liabilities
12 Acquired". I take it this is a reference to the sale
13 transaction, yes?

14 A. Yes.

15 Q. And that's also written on Saturday, September 20th, yes?

16 A. Yes.

17 Q. And you tell James and Gary, "Right now the BS" -- which I
18 take it means balance sheet --

19 A. Yes.

20 Q. -- is that right?

21 A. Yes.

22 Q. Okay. "Right now the BS is still a work in progress.
23 Will probably take overnight to resolve. Will keep you
24 updated."

25 Here is what we know and don't know: You put cash at

1 seven billion, see that?

2 A. Yes.

3 Q. And you put inventory at 44.8 billion, correct?

4 A. Yes.

5 Q. And then there's that 15c3 at a billion, right?

6 A. Yes.

7 Q. And further down, "Financing, 45.2 billion. Believe this
8 to be a good number. Will need to validate with you." What's
9 the 45.2 that's referred to there?

10 A. It could be the shorts or repo financing.

11 Q. Might be in the repo?

12 A. Could be the repo.

13 Q. Okay, and if you added 45 billion in the repo to 7
14 billion, you'd get the 52.8 billion dollar number, or in that
15 range, that you were calculating on your handwritten notes,
16 correct?

17 A. I'm sorry. Can you say that again, please?

18 Q. If you took the seven billion dollar cash, that's your
19 item 1, and the forty-five billion dollar repo number, you come
20 roughly to the fifty-two billion dollar number you've calcu --
21 that was calculated on that opening balance sheet we looked at,
22 isn't that right?

23 A. Yes, that's right.

24 Q. Yes?

25 A. Yeah, it appears to, yeah.

1 Q. And then in item 5, "Other Payables": "Partly on our
2 books today, partly purchase price related. 4.25 billion
3 agrees to PA." You see that?

4 A. Yes, I do.

5 Q. PA means purchase agreement, correct?

6 A. I believe so, yes.

7 Q. And this memo tells Mr. Walker and Mr. Romain that the
8 cure number consists, at least in part, of items that are the
9 result only of the purchase agreement, not of actual cure
10 liabilities, is that right?

11 A. Sorry, could you ask that again?

12 Q. 4.25 agrees to PA?

13 A. Right. Sorry, what was your follow-up question, please?

14 Q. Let me ask the question again. Item 5, quote, "Other
15 Payables": "Partly on your books today, partly purchase price
16 related. 4.25B agrees to PA." Do you see that?

17 A. Yes, I do.

18 Q. That's your telling Mr. Walker and Mr. Romain that part of
19 the estimates for cure and comp were based only on the purchase
20 agreement and were not based anywhere on Lehman's books, isn't
21 that right? Isn't that what you meant when you said "4.25B
22 agrees to PA"?

23 A. I don't know what I meant. I think that the component of
24 that 4.25 that represents comp is the negotiated number. The
25 component of that that represents cure -- I guess I have a few

240

1 observations: one, it's at the 2.25 number, not at the 1.0
2 number; I don't know why that is. It's -- the process to
3 estimate cure, as far as I recall, hadn't been finished at this
4 point. So there wasn't an actual accrual for cure. Cure was a
5 broader concept. And I think at all times we were working with
6 estimates.

7 Q. It was never estimated at lower than the amount on
8 Lehman's books, right?

9 A. We didn't have an est -- we didn't have anything on the
10 books for cure. It was -- cure was sort of -- encompassed some
11 liabilities recognized on the books and potentially others.
12 But there wasn't an ability to go to the ledgers and pull out
13 certain accounts and say that's cure. It wasn't possible.

14 Q. Now, I'd like you to turn, Mr. Kelly, to Exhibit M-14.
15 And M-14, in evidence, is a set of your handwritten notes, is
16 it not?

17 A. No, I think this is Ian Lowitt's handwriting.

18 Q. Well, isn't it a fact, sir, that the handwriting is yours
19 on all but the second page?

20 A. I think it's all mine except for the front page and except
21 for the number on the top of the second page, which says
22 "61.9". I don't recognize that as mine.

23 Q. So the handwriting on the very first page, the one -- I
24 got it.

25 Let's turn to page 115169. Is that your handwriting on

1 that page, sir?

2 A. It is, except for the number on the top. The 61.9 I don't
3 recognize.

4 Q. Which number's not yours, sir?

5 A. The 61.9.

6 Q. Do you know whose handwriting that is?

7 A. I think it's Ian's. I'm not sure.

8 Q. Now, in the middle of the page there's -- in your
9 handwriting there is this annotation that has three columns:
10 BV -- you see that?

11 A. Yes.

12 Q. Proceeds, see that?

13 A. Yes.

14 Q. And Loss/Gain, do you see that?

15 A. Yes.

16 Q. All right, and in this calculation, sir --

17 MR. GAFFEY: Actually, maybe we just blow up that
18 whole page? Just bring from BV, there, all the way down to the
19 bottom and put it all up on one slide. There you go.

20 Q. Now, BV stands for book value, correct?

21 A. Yes.

22 Q. And these notes show your calculation -- well, the
23 calculation's meant to show an estimate of the assets and
24 liabilities being sold to Barclays, and they're associated
25 values on Lehman's books, is that right?

1 A. The -- you're referring to the first column?

2 Q. Well, I'm referring to the whole calculation, but --

3 A. I think the first column is referring to the then current
4 book values to Lehman. I think the second column is most
5 likely referring to the negotiated values for each of those
6 items as a -- sort of a proxy for the proceeds.

7 Q. Okay.

8 A. And then the last column is the resulting difference.

9 Q. And that shows the difference between what's shown on
10 Lehman's books with the price that was actually agreed, yes?

11 A. Sorry, can you just ask that one more time?

12 Q. That shows the difference between the amount shown on
13 Lehman's books and the price that was actually agreed, yes?

14 A. Using these book values, that's correct, yeah.

15 Q. Okay. And those -- that -- those calculations lead you to
16 have calculated a loss to Lehman of approximately 5.25 billion,
17 is that right?

18 A. Yes, that's right.

19 Q. And when you calculated that loss, it was primarily a
20 function of the difference between the book value of the
21 inventory and the value negotiated, is that right?

22 A. Yes, primarily.

23 (Pause)

24 MR. GAFFEY: Your Honor, may I consult for just one
25 moment? I want to make sure I've kept track of the documents

1 I'm supposed to.

2 THE COURT: Sure.

3 (Pause)

4 MR. GAFFEY: Your Honor, I maybe actually am -- a bit
5 of housekeeping: one more document with regard to -- I thought
6 there was an objection to Movants' 7 and, if so, I need to move
7 it in through the witness. It's a copy of Movants' 8, same
8 text.

9 MR. SCHILLER: We have no objection, Your Honor.

10 MR. GAFFEY: And, Your Honor, I have no further
11 questions for Mr. Kelly at this time.

12 THE COURT: So is that document in?

13 MR. GAFFEY: Yes --

14 THE COURT: Fine.

15 MR. GAFFEY: -- at least according to us.

16 THE COURT: Let's see if we can complete the direct
17 this evening.

18 Just for planning purposes, Mr. Maguire, do you have
19 any sense as to the length of your examination?

20 MR. MAGUIRE: I would estimate maybe twenty minutes,
21 Your Honor.

22 THE COURT: Okay.

23 And will the committee be examining?

24 MR. KIRPALANI: We're not asking any questions, Your
25 Honor.

1 THE COURT: All right. Fine.

2 MR. MAGUIRE: May I approach, Your Honor?

3 THE COURT: Yes, you may. It's a very thin book.

4 (Pause)

5 MR. MAGUIRE: If it please the Court.

6 CROSS-EXAMINATION

7 BY MR. MAGUIRE:

8 Q. Sir, my name is Bill Maguire. I represent the SIPA
9 trustee.

10 You have the thin book, black binder, your counsel
11 provided you?

12 A. Yes, I do.

13 Q. I believe you mentioned in the course of your testimony
14 this afternoon that you had done some work in connection with
15 calculating or attempting to calculate the 15c3 reserve
16 requirement for Lehman, is that correct, sir?

17 A. Yes, that's correct.

18 Q. That was a -- turned into a substantial undertaking, did
19 it not?

20 A. Yeah, it was a very complex and lengthy process.

21 Q. Sir, if you'd turn to the second tab in your binder,
22 you'll see Movants' Trial Exhibit 438.

23 A. Yes.

24 Q. That is an e-mail, on which you were copied, that was sent
25 by Lehman's Paolo Tonucci on Saturday, September 20 at around

1 forty minutes after 9 o'clock in the evening, is that correct?

2 A. Yes, that's correct.

3 Q. And that concerns the 15c3 calculation?

4 A. Correct.

5 Q. And this was sent to a representative of the United States
6 Securities and Exchange Commission, correct?

7 A. Yes, that's correct.

8 Q. And that's Mr. Macchiarelli (ph.)?

9 A. Correct.

10 Q. And in that, Mr. Tonucci told Mr. Macchiarelli that "We
11 may need your quick response to a rerun of the 15c3 calc as of
12 Friday." You see that, sir?

13 A. Yes, I do.

14 Q. And that was a reference to Friday, the 19th of September,
15 correct?

16 A. I'm not sure. Probably, but I'm not -- yeah, likely, I'd
17 say.

18 Q. This was Saturday the 20th, right?

19 A. Right.

20 Q. And you and your colleagues were engaged at that stage in
21 trying to do the most current and necessary 15c3 calculation,
22 correct?

23 A. Yeah, certainly on the Saturday, that's correct.

24 Q. Mr. Tonucci went on to say "We expect that there will be a
25 further reduction in the requirement because of the transfer of

1 clients and continued reduction in client exposures.
2 Consequently, we hope to release some cash which would become
3 part of the sale." That was consistent with your understanding
4 at that time, correct?

5 A. My understanding was that there was -- an effort was
6 started, I think on the Friday, to determine if there was
7 excess or a surplus in the 15c3 calculation requirement
8 relative to the actual cash that was locked up. I understood
9 that that was in the context of needing to find assets for
10 Barclays because other assets that we thought were available
11 were in fact not available to be sold.

12 Q. And you understood in the course of the process, to the
13 extent you were tasked with running or determining what the
14 reserve requirement was under Rule 15c3, it was important for
15 Lehman, you and your colleagues to be transparent with the
16 Securities and Exchange Commission?

17 A. I mean, I think, to the extent that the calculation could
18 be as accurate as possible, then that would be important. So,
19 yes, I would agree with that.

20 Q. If you turn to the next tab, you'll see Movants' Trial
21 Exhibit 452.

22 (Pause)

23 Q. And, sir, I'm going to ask you about the e-mail at the
24 bottom of the first page, continuing to the top of the second
25 page, and that's an e-mail that was sent by Anthony Stucchio at

1 around 11 o'clock Saturday night to a number of people,
2 including you?

3 A. Yes.

4 Q. And that's an update on 15c3-3, you see that?

5 A. Yes, I do.

6 Q. And in that, Mr. Stucchio reports "As I have mentioned
7 previously, the number of stock record breaks are
8 overwhelming."

9 Can you tell us, sir, what did you understand were the
10 stock record breaks?

11 A. I understood that the -- there were a lot of fails, both
12 into Lehman and out of Lehman, around unsettled transactions.
13 And fails impacts the requirement of the 15c3 formula to the
14 extent that you need to lock up cash, in some predefined
15 percentage, based on the amount of fails; on both sides,
16 actually, in and out, delivers and receives.

17 So I think that, in my mind, the fails were driving the
18 complexity in the formula, and I think that this, in my mind,
19 is an overlap or a correlation between the fails and the stock
20 record breaks.

21 Q. If you'd turn to the next tab, sir, Movants' Trial Exhibit
22 236. The bottom of the first page, this is an e-mail that you
23 referred to earlier in your testimony; it's one that you sent
24 Saturday night at just after 9 p.m.

25 A. Yes, I see that.

1 Q. And in item 3 you note "15c3 receivable, 1B" -- is that
2 one billion dollars?

3 A. That's correct.

4 Q. -- "have many breaks/fails here. Have a large team
5 working now and through the night to resolve." Was that in
6 fact the case, sir?

7 A. Yes, it was.

8 Q. At the top of the page, you send an e-mail to James Walker
9 at Barclays at -- on Sunday at about 2:30. You see that, sir?

10 A. Yes, I do.

11 Q. And you note "Have been working all night trying to clear
12 up 15c3 issue. Will be in contact as soon as I can."

13 You were trying to keep Barclays on the loop on your
14 efforts, were you not, sir?

15 A. Yeah, I think I was trying to keep them updated on what
16 the calculation was showing in terms of what the reserve
17 requirement was and what the cash lockup was.

18 Q. I guess it was of keen interest to Barclays, was it not?

19 A. It was of interest. I'm not sure it was of keen interest,
20 to be honest. I think it was one of many issues, I think, that
21 were still being worked through at that time.

22 Q. No one from Barclays suggested that you did not need to
23 bother them with any updates on 15c3?

24 A. No.

25 Q. If you'd turn to the next tab, Movants' Trial Exhibit 463.

1 This, sir, is a preliminary reserve -- customer reserve
2 requirement analysis, is it not, as of Friday, September 19?

3 A. Yes, that would appear to be the case.

4 Q. If you'd turn to the next tab, Movants' Trial Exhibit 548.
5 This is an e-mail that you sent to Mr. Stucchio Sunday the 21st
6 after 10 p.m.?

7 A. Yes, I see that.

8 Q. You refer in the second sentence of your e-mail to the
9 latest version of 15c3, and you refer to a "big caveat around
10 ADP". What were you referring to there?"

11 A. Well, if you turn back to the prior exhibit, ADP was one
12 of the sections of the formula, so that that long Excel
13 spreadsheet has a section entitled "ADP". The MTS system,
14 which is referred to above, and the ADP system we used for
15 different types of securities. And so there were multiple,
16 sort of, calculations within the overall calculation that
17 needed to be undertaken. And so --

18 Q. If you go on -- I'm sorry. Were you finished with your
19 answer?

20 A. Yeah, so ADP was one component of the overall calculation.
21 Evidently, that was the one that was causing us some concerns
22 in terms of data completeness and quality.

23 Q. In the last couple sentences of your e-mail you say "My
24 plan with SEC" -- and you're referring to Securities and
25 Exchange Commission?

250

1 A. Yes.

2 Q. -- "is not to fight the formula but to create a mechanism
3 under which Barclays has first lien to first billion dollars as
4 it clears up. That way, we hold onto the cushion until the
5 customer account balances clear." You see that, sir?

6 A. Yes.

7 Q. If you'd turn to the next exhibit, Movants' Trial Exhibit
8 492. If we start on the second page of the exhibit, sir, you
9 will see that the second e-mail from the bottom is from Robert
10 Azerad, and that was sent Sunday, September 21 at 5:16 p.m.

11 A. Right. I see that.

12 Q. Mr. Azerad was Lehman's global head of assets and
13 liabilities management?

14 A. He had a senior role in treasury, reporting to Paolo.
15 That may have been his function.

16 Q. You'll see the subject is entitled "Final 15c3-3 Reserve
17 Formula as of 9/17/2008". You see that?

18 A. Yes, I do.

19 Q. And Mr. Azerad's e-mail said "Any estimate for 9/19",
20 September 19, "this is what is urgently needed." You see that,
21 sir?

22 A. Yes.

23 Q. Now, at that time there were a number of iterations being
24 made of the 9/19 reserve requirement, correct?

25 A. I recall many versions of the calculation; it likely

1 included for the 19th. I don't recall that specifically.

2 Q. If you turn to the next tab, you'll see Movants' Trial
3 Exhibit 237. At the bottom of the first page is your e-mail to
4 Gary Romain and a number of other people, which you send
5 Sunday, September 21 at 5:33 p.m. See that, sir?

6 A. Yes, I do.

7 Q. Who's Gary Romain?

8 A. Gary works at Barclays and he was in charge of the
9 technical accounting group at Barclays Capital.

10 Q. These other names, the other people you sent this e-mail
11 to, by whom were they employed?

12 A. Well, like I say, Barclays employees were Gary Romain,
13 James Walker, T.J. Givenda and Matt Hughey. Actually, and Bob
14 Martini (ph.). So all the two recipients are, like I say,
15 Barclays. All the cc'd were, like I say, Lehman.

16 Q. The first cc is Chris O'Meara. What was Chris O'Meara's
17 role?

18 A. At this stage I recall Chris became involved in helping
19 think through some of the issues around getting information
20 that were needed for the calculation.

21 Q. You say in your e-mail "Trying to get hold of the SEC to
22 ensure they are in agreement with our approach." Did you
23 personally get in touch with the SEC, sir?

24 A. No, my recollection at this time is that Paolo was doing
25 that, and I think I was speaking on behalf of Lehman. I did

1 have a conservation with Mike Macchiarelli at the SEC, but it
2 was -- I think it was the following week. I'm almost certain
3 it was the following week. And I walked past a conversation
4 that he was already having with Paolo.

5 Q. If you'd turn to the next tab, sir, Movants' Trial Exhibit
6 450? This is an e-mail on which you were copied, an e-mail
7 that Chris O'Meara sent to Bart McDade. And he's reporting
8 progress on 15c3, and he describes, starting in the middle of
9 his e-mail, "We spoke with SEC as well to tell them the plan
10 and explain that some amount of the excess 15c3-3 lockup is
11 part of the purchase price consideration."

12 That was consistent with your understanding, was it not,
13 sir?

14 A. I don't think at this point I ever understood what the
15 specific agreement was around the 15c3 surplus. At this point
16 I understood that calculating the surplus was very important
17 and it was related to the transaction in the context of finding
18 assets to replace others that weren't available. But at this
19 time I didn't have an understanding of how that factored into
20 the purchase agreement or the purchase price consideration.

21 Q. The next sentence goes on to say "They", meaning the SEC,
22 "don't object but want to see the info once the reconciliation
23 break has been resolved, and want to ensure that all customer
24 balances are moved cleanly before authorizing the release of
25 the cushions."

1 That was consistent with what you understood to be the
2 position of the SEC, is that correct, sir?

3 A. Yeah, I think there was certainly an understanding that we
4 needed to speak with the SEC. I don't know if I knew at the
5 time whether we required their formal approval, but I was aware
6 of the concern that they had around ensuring that there's
7 appropriate segregation for customers. And at one point, I
8 think, separation of the needs for customers that were moving
9 to Barclays versus staying behind was something that Mike
10 Macchiarelli at the SEC asked us to do; so to run yet another,
11 sort of, version of the formula, looking at customers going or
12 staying.

13 Q. If you'd turn to the next tab, Movants' Trial Exhibit 83.
14 Is that the subject of the e-mail that you sent Monday,
15 September 22 and just after 1 a.m.?

16 A. Yes, I believe that relates to my prior comment.

17 Q. And so you reported "Guys, SEC told us we need to do a
18 15c3 calc" -- that's a calculation, right?

19 A. That's right.

20 Q. -- "for each of the accounts that transfer and those which
21 will not, before they are comfortable" -- "they" is a reference
22 to the SEC?

23 A. Yes.

24 Q. -- "releasing cushion/surplus to Barclays. We agreed with
25 Weil. A mechanic to have" -- "A mechanic to have value

1 transferred to Barclays as it'd freeze, when we have the
2 separate calculations done, the SEC will permit us to transfer
3 the one billion. Once the ADP break is resolved, the team
4 needs to focus on separate calculations in the next day or so."

5 And then you continue, correct?

6 A. Right.

7 Q. If you'd turn, sir, to the next tab, Movants' Trial
8 Exhibit 513? If you turn to the second page of the exhibit,
9 you'll see an e-mail that you sent to a number of executives,
10 and this is dated Friday, September 26. Now, this is the end
11 of the week following the closing, and it's on the subject,
12 same subject, "15c3 Process", right?

13 A. Correct.

14 Q. This had turned into an arduous exercise, had it not?

15 A. Yeah. This was a long complex process.

16 Q. You report that "There are some significant open items
17 that need to be resolved to finalize the 15c3 process and free
18 up cash to make payment to Barclays." You see that?

19 A. Yes, I do.

20 Q. And you referred to your concern that several of these
21 items were -- "will require significant time and effort,
22 sometimes out of our control", and you referred specifically to
23 Chase, SIPC and the SEC. You see that?

24 A. Yes, I do.

25 Q. Now, if you look down the list, you have a list of items

1 of these significant open items. And if you go down to the
2 fourth one down, you'll see where it starts "We have posted
3 prop Treasury positions at the OCC."

4 A. Yes.

5 Q. When you say "prop", you mean proprietary --

6 A. I --

7 Q. -- is that correct?

8 A. Yeah, I believe so, yeah.

9 Q. So this is Lehman property that was posted at the OCC in
10 the amount of half a billion dollars, correct?

11 A. Sorry. Could you just repeat that question, please?

12 Q. Yeah. The first sentence in that asterisk, "We have
13 posted prop Treasury positions" -- that's proprietary Treasury
14 positions, right?

15 A. Yes, I believe so.

16 Q. So that's Lehman property?

17 A. Um -- I don't know, actually. It could be Lehman; it
18 could be customer.

19 Q. Okay. Well, let's continue reading. -- "Treasury
20 positions at the OCC of half a billion dollars to cover
21 customer margin requirements on option positions." So Lehman
22 customers had positions, right?

23 A. Yes.

24 Q. And those positions were collateralized with this half
25 billion dollars at the OCC, right?

1 A. Yeah, some -- I don't -- I don't recall, but, yeah, it
2 would appear from this that some portion somehow is
3 collateralized with the half a billion.

4 Q. Well, this goes on to say "This has been reflected as an
5 offset to the reserve requirement." That's the 15c3 reserve
6 requirement, is it not, sir?

7 A. I expect so, yeah.

8 Q. And it's a fact, is it not, that a broker-dealer who sets
9 aside collateral at the OCC is allowed to take as a debit item
10 on the customer reserve account that cash and use that cash to
11 reduce the amount of the reserve requirement that it would have
12 to set aside for the exclusive benefit of customers?

13 MR. SCHILLER: Objection, Your Honor, to the extent
14 the question calls for a legal conclusion by Mr. Kelly.

15 THE COURT: I'll sustain that objection.

16 But you can rephrase it.

17 MR. MAGUIRE: Certainly.

18 Q. If we continue in your -- in this asterisked section of
19 your e-mail, you note that "As part of the account transfer, we
20 will be making payment to Barclays to cover the half billion of
21 customer payables they are assuming." And what you're
22 referring to there is full responsibility --

23 MR. MAGUIRE: Let me strike that.

24 Q. When customers take positions, they are required to
25 deposit collateral with the broker-dealer, are they not?

1 A. Yes, that's correct.

2 Q. And the half billion dollars that they had deposited with
3 Lehman was being transferred to Barclays? That's what you're
4 referring to here, right?

5 A. I don't know if the half billion is customer or firm. I'm
6 confused because we refer to -- I refer to prop positions.

7 Q. Well, let me make this simple. A customer deposits money
8 as collateral with Lehman; when that happens, the company has a
9 payable to the customer, does it not?

10 A. Yes.

11 Q. And that payable was being transferred to Barclays, was it
12 not --

13 A. I'm aware --

14 Q. -- with the customer accounts?

15 A. Well, if these were the customer accounts that were
16 moving, then, yes. I just -- what I can't tell you is which
17 customer accounts were moving or not. And --

18 Q. Well, we're obviously talking here about making payment to
19 Barclays. So that would be for customers who are transferring
20 to Barclays, not for customers who are not transferring to
21 Barclays, isn't that fair, sir?

22 MR. SCHILLER: Objection. I'm not sure that there is
23 a foundation for this question in terms of them being customer
24 accounts, Your Honor.

25 THE COURT: Well, I'm not sure either, but if the

1 witness understands the question I'm going to let him answer
2 it. If he doesn't, and he might not, Mr. Maguire can try
3 again.

4 A. I am struggling with the question. I need one minute just
5 to read that entire --

6 Q. Yeah, take your time.

7 A. -- section, if I could.

8 Q. Take all the time you need. Just let me know when you're
9 ready.

10 A. Okay.

11 Q. Let's take it in steps. Let's start with the sentence:
12 "As part of the account transfer". See that?

13 A. Yes.

14 Q. -- "we will be making payment to Barclays to cover the
15 half billion dollars of customer payables they are assuming."
16 Now, the customer payables that Barclays was assuming was
17 payables to customers, was it not?

18 A. I -- that, I think, is right from reading the words here.
19 I --

20 Q. It says "customer payables", does it not?

21 A. It says "customer payables", yeah. So, definitionally,
22 that's payables to customers.

23 Q. Okay. So Barclays was taking on the responsibility to pay
24 customers the half billion dollars, and in connection with that
25 you noted here that Barclay -- that Lehman was transferring --

1 sorry -- "We will be making payment to Barclays to cover the
2 half billion dollars of the customer payables."

3 So Barclays was taking the customer payables and Lehman
4 was giving Barclays a payment of half a billion dollars to
5 cover that obligation to customers?

6 A. I don't disagree with that reading of the words.

7 Q. Okay.

8 A. I don't recall the e-mail, but that's -- I don't disagree
9 with that.

10 Q. You were concerned, however, about an additional issue,
11 because you say "I need confirmation that the prop Treasury
12 positions have not also been transferred to Barclays as part of
13 the asset sale," right? That was your concern in this open
14 item?

15 A. That would -- yeah, that would appear to be the case;
16 they're not being double-counted.

17 Q. Because then you would have double-counting, isn't that
18 right? Barclays would be getting the half billion dollars not
19 once but twice?

20 A. Yes, if it's prop positions in both cases. I think if it
21 was customer collateral that was being moved over, then no,
22 that should not have been reflected as a -- as an asset on the
23 books of Lehman.

24 Q. And you go on to say "I need confirmation that the prop
25 Treasury positions have not also been transferred to Barclays

1 as part of the asset sale." And you go on to say "If they have
2 been transferred as part of the sale, the reserve surplus must
3 correspondingly be reduced by a half billion dollars."

4 And when you say "the reserve surplus", you're talking
5 about the result of the 15c3 calculation?

6 A. That's correct, yeah.

7 Q. Now, sir, the last open item on your e-mail, you say
8 "Finally, we need to provide to the SEC a reserve schedule
9 splitting customer accounts between those which stay at Lehman
10 and those which move to Barclays. We cannot obtain SEC
11 approval to release funds from the reserve until this is
12 complete," correct?

13 A. That's what it says here.

14 Q. Okay. Now, sir, let me ask you just very briefly about
15 the subject of Lehman's margin, and when I say "Lehman's
16 margin", I'm referring to cash, cash equivalents or government
17 securities that Lehman posted at clearing organizations like
18 the Options Clearing Corporation, okay?

19 A. It's own assets. Okay.

20 Q. In the course of your employment at Lehman, through all of
21 the events of the week of September 15 and through the closing,
22 you were not at any time aware that any Lehman margin was to be
23 transferred from Lehman to Barclays, isn't that right, sir?

24 A. I was not aware one way or the other.

25 Q. And, in fact, you didn't become aware that there was any

1 issue about Barclays claiming some entitlement to Lehman's
2 margin until after you had settled into your new role at
3 Barclays, isn't that right?

4 A. Yeah, I think that's correct, but my involvement
5 throughout the week was around certain pieces of the
6 transaction. So I don't think I -- I didn't really have a --
7 an understanding one way or the other at that time.

8 Q. And in none of the work that you did on the balance sheet,
9 whether it was the opening balance sheet for Barclays or the
10 closing balance sheet for Lehman, however you wish to describe
11 it, in none of that balance sheet work, in none of the work
12 about the transaction adjustments, in none of the work that you
13 did with the senior finance people at Lehman, did it ever come
14 to your attention that Lehman margin was going to Barclays,
15 correct?

16 A. I don't think it did at the time, partly based on the
17 versions of the balance sheets that I've seen since then. I
18 don't recall that. And I think what the team -- me as part of
19 the team were doing were trying to keep up with the transaction
20 as it evolved. And I think, as we've seen today, there were --
21 you know, there wasn't instantaneous communication between all
22 people on changes at all times. So, you know, it -- something
23 could have been negotiated and I just didn't know about it, nor
24 would my team, who I think were probably a step or two behind
25 my understanding.

1 Q. Well, if anybody did any -- ever negotiate any such thing,
2 they sure didn't tell you about it?

3 A. No, they didn't, but I wasn't being advised of many of the
4 changes that were occurring. It actually, frankly, doesn't
5 surprise me.

6 MR. MAGUIRE: No further questions.

7 THE COURT: Let me ask you a question, Mr. Schiller.
8 Would you like to complete with the witness this evening?

9 MR. SCHILLER: Yes, I would.

10 THE COURT: And does everybody, including the witness,
11 have the stamina for that?

12 MR. SCHILLER: I can complete the witness this
13 evening, and I'll need about thirty minutes. If we took a ten-
14 minute break -- I don't know what your Court's preference is at
15 this hour, Judge. It's ten to 6.

16 THE COURT: If we compl -- if we make the commitment
17 to do that and can finish before 6:30, it seems to me that
18 we'll do a better job of staying on the schedule that we've
19 allowed for ourselves, because we have another witness who was
20 to have started this afternoon, who is supposed to continue
21 tomorrow, Mr. Lowitt, and we'll do a better job of staying on
22 schedule if we complete -- so I suggest we try to do that if we
23 can. And a break is fine.

24 MR. SCHILLER: My colleague advises me, though,
25 there's a section to do that's going to involve documents that

1 I will require some time to pull together; not a lot of time.
2 I could do it efficiently in the morning in thirty minutes,
3 more efficiently than I can do it now. It would just take
4 longer, that's all, Judge.

5 THE COURT: Well --

6 MR. SCHILLER: And I ask the Court's indulgence in
7 that.

8 THE COURT: It also seems to me that, from Mr. Kelly's
9 perspective, he gets to go back to work tomorrow too, which is
10 not a bad thing.

11 Why don't we take a ten --

12 MR. SCHILLER: Why don't I -- I can -- Your Honor, may
13 I? I'm sorry.

14 THE COURT: I was going to say why don't we take a
15 ten-minute break and kind of --

16 MR. SCHILLER: Sure.

17 THE COURT: -- collect our thoughts on this, and maybe
18 you can do it in a half hour starting at 6.

19 MR. SCHILLER: I will try. Thank you.

20 THE COURT: Let's take a ten-minute break.

21 (Recess from 5:49 p.m. until 6:03 p.m.)

22 THE COURT: Be seated, please.

23 (Pause)

24 THE COURT: Please proceed, Mr. Schiller.

25 MR. SCHILLER: Thank you, Your Honor.

1 CROSS-EXAMINATION

2 BY MR. SCHILLER:

3 Q. Good evening, Mr. Kelly. Jonathan Schiller for Barclays.

4 A. Good evening.

5 MR. SCHILLER: I have one other exhibit, Exhibit 589,
6 that I'd like hand to the Court. May I approach?

7 THE COURT: You may.

8 (Pause)

9 MR. SCHILLER: And we -- may we put up Movants'
10 Exhibit 235, please?

11 Q. Mr. Kelly, you were asked about this document and your
12 handwriting, do you recall that?

13 A. Yes, I do.

14 Q. Let me ask you to look at Movants' Exhibit 589, please.
15 There's an e-mail from Ian Lowitt at the bottom of this string,
16 dated September 17th at 22:00 hours. Do you see that? And
17 you're copied on it.

18 A. Yes, I see that.

19 Q. And it reads "Today was very bad, with very large number
20 of surprises and increased requirement of seven-or-so billion.
21 Cannot get through tomorrow if not tighter. Cannot get through
22 tomorrow if not tighter. (sic) Not sure what to suggest other
23 than someone makes ensuring great discipline the number one
24 priority. Let's huddle in the morning to see the best way
25 forward. Also, need to shrink matched book, which as of

1 yesterday was much larger than expected. Gerry and Martin have
2 details. Ian."

3 You recall getting this e-mail at the time, or was it --
4 or did you receive it at the time?

5 A. I recall -- I don't recall the e-mail specifically. I can
6 see that I was cc'd on it. I do recall increased requirements,
7 financing haircuts, which I think is what the "seven-or-so
8 billion" is referring to.

9 Q. And tell the Court what "shrink matched book" meant to you
10 as of September 17th, please.

11 A. Well, the matched book was financing to customers,
12 generally hedge funds, which was done through the form of
13 reverse repo contracts and repurchase contracts.

14 Q. And was this need to shrink matched book on September 17th
15 a responsibility for you to take on?

16 A. No, it was not.

17 Q. Was this a key issue facing your team that day?

18 A. I don't recall this being an issue at that time.

19 Q. Let me show you Movants' Exhibit 188, which is an e-mail
20 from Ian Lowitt to Gerard Reilly and Michael Bilaban (ph.) in
21 which you and Paolo Tonucci are copied. Do you see that?
22 September 18th?

23 A. Yes, I do.

24 Q. This is the next day: "Also need to figure out how to
25 shrink down matched book, unless, Gerry, that hasn't yet been

1 reflected in balance sheet we looked at yesterday. Gerry, sit
2 with Cogs (ph.) and Mike to figure out what we need to do and
3 if balance sheet showing matched book at forty is right. Ian."
4 You see that?

5 A. Yes, I do.

6 Q. Does this reflect your recollection whether this was a key
7 issue facing your time?

8 A. I don't recall this being an issue.

9 MR. SCHILLER: May we have M-14 up on the screen,
10 Movants' Exhibit 14?

11 Q. Your handwritten notes. Now, you see the column on the
12 left under "BV" where it refers to inventory?

13 A. Yes, I do.

14 Q. And what's that number there?

15 A. I believe this was an estimate of assets exclusive of the
16 repo book, the reverse repo book if it's an asset.

17 Q. Did the inventory include all mortgages at that time in
18 your note?

19 A. I don't know -- I don't know when this page was written,
20 so I don't know. I remember the mortgages being included and
21 the proposed sale changed, but I'm not sure if this includes
22 all, half or none of the mortgage book.

23 MR. SCHILLER: May we have Exhibit 2 from Movants'
24 book on the screen, please?

25 Q. You see this schedule that you were asked about earlier?

1 A. Yes, I do.

2 Q. And under "Assets", do you see "Mortgages".

3 A. Yes, I do.

4 Q. And does this reflect the mortgages at fifty percent, as
5 far as you recall?

6 A. Yeah. My recollection is that the mortgages were around
7 six billion in total. So this would be approximately fifty
8 percent of that.

9 Q. So a hundred percent of that would be 5.4, right?

10 A. If you took this number grossed up, that would be right.

11 Q. So returning to Exhibit 14, the total book value would be
12 sixty-five, wouldn't it?

13 A. Grossed up -- uh --

14 Q. With a hundred percent --

15 A. Yes.

16 Q. -- of the mortgage.

17 A. At a hundred percent, yes.

18 MR. SCHILLER: Let's turn to M-1, the APA, and page 6
19 of the APA, please.

20 Q. Mr. --

21 MR. SCHILLER: And let's go down to paragraph (d)
22 under "Purchased Assets".

23 Q. Mr. Kelly, you were asked earlier in your examination
24 whether that number, approximately seventy billion long
25 positions, was false. And I recall -- noted your answer that

1 it was the negotiated values representing the market conditions
2 at the time. If that is indeed what it was, is it false?

3 A. What do you mean by "false"?

4 Q. Let me ask you -- approach it differently. When you say
5 to the Court a number represents negotiated values representing
6 the market conditions, what negotiated values are you referring
7 to?

8 A. When I said that, I meant the values of the assets that
9 had been negotiated between the respective Lehman and Barclays
10 traders.

11 Q. And if seventy billion on long positions reflects that
12 negotiation, would you believe it to be accurate?

13 A. Yes, I would.

14 Q. You were asked about cure in your examination, and you
15 testified to the Court that you believed the 2.25 number was
16 too high at some point, you couldn't remember precisely when
17 that was, and that you, or you together with Mr. Lowitt,
18 thought about another way to do it. Do you remember that
19 testimony?

20 A. Yes, I do.

21 Q. And I think you said to the Court it had something to do
22 with a one-quarter run rate?

23 A. Yes, that's right.

24 Q. Is that a scientific way to do cure?

25 A. No. That was an estimate that we developed and suggested

1 as a reasonable way, based on the information we had at the
2 time, to estimate what the cure liability might ultimately
3 become.

4 Q. And because of operational problems, was it possible to
5 identify and acquire all the contracts relevant to approaching
6 the cure issue?

7 A. It was -- I don't think it was possible to calculate a
8 precise number for what I understood to be cure, for a variety
9 of reasons, including operational but also including
10 definitional in terms of what was in and what was not, and also
11 just not having contract-level information to understand what
12 the obligation might be if the contracts were assumed by
13 Barclays.

14 Q. And without that information that you described, you
15 developed this alternative way to value cure and you estimated
16 it to be about one billion dollars, is that right?

17 A. That's right. I was aware that there was a process that
18 was on the way to try to identify, from a bottoms-up basis, all
19 the components of what the cure liability might look like. I
20 was aware that that was a large process. I didn't think that
21 it would be completed within the time frame that we had.

22 And so we -- I, or I and Ian, developed an estimate, and
23 it was simply in the absence of having any more detailed
24 information and access to contracts and the like, based off
25 what the firm's expense run rate was.

1 Q. And you shared that information with whom on Monday,
2 Tuesday or Wednesday of that week?

3 A. I think it was Tuesday or Wednesday. And if it was me
4 that developed it, I shared it with Ian first, and then we both
5 went to Bart. If it was Ian and I that developed it, then we
6 both went to Bart.

7 Q. And I think you advised the Court of your testimony as to
8 what Mr. McDade's response was to that. You also were asked
9 about whether you spoke to anyone else about it during that
10 week, any of the lawyers or financial advisors. You recall
11 that?

12 A. I do, yeah. I --

13 Q. And you responded that you had had a conversation with
14 Weil. When was that? And would you describe that conversation
15 for the Court, please?

16 A. Sure. My recollection is that that conversation was on
17 Friday morning, the 18th -- 19th. It was a call that I
18 received from Lori Fife at Weil, and it was in reaction to an
19 updated version of the balance sheet that she had received
20 through one of her team or one of her partners, where she made
21 an observation that the cure estimated had moved relative to
22 where it was earlier in the week.

23 There was some urgency to the conversation, and I believe
24 it was Friday morning, because I had an understanding -- or I
25 do have an understanding that Ms. Fife was leaving shortly or

1 on her way to court.

2 Q. Were you asked about that conversation by Movants at your
3 deposition, do you recall?

4 A. I don't believe so.

5 Q. Let me turn to the subject of margin. What knowledge do
6 you have, sir, about the terms of the parties' agreement
7 regarding margin associated with exchange-traded derivatives?

8 A. Could you repeat that, please?

9 Q. What knowledge do you have about the parties' agreement
10 regarding margin that is associated with exchange-traded
11 derivatives?

12 A. At the time, I had no knowledge.

13 Q. Okay. What expertise do you have, if any, concerning the
14 rules and regulations of the Securities Investor Protection
15 Act?

16 A. I don't think I have even a cursory understanding.

17 MR. SCHILLER: Let me ask you to put up Exhibit 1 for
18 Mr. Kelly, please.

19 (Pause)

20 MR. SCHILLER: And let's go down to the bottom
21 paragraph there. And blow it up.

22 Q. Do you recall being asked about this paragraph and what
23 "amount of block discount" meant?

24 A. Yes, I do.

25 Q. And as I recall your testimony, you didn't have an

1 understanding of it?

2 A. That's right. It's not a term that I'm familiar with.

3 MR. SCHILLER: Let me ask you to pick up the book that
4 we distributed, Your Honor; Exhibit 7 in that book.

5 (Pause)

6 MR. SCHILLER: Oh, I'm sorry, Judge. I thought we
7 distributed it.

8 THE WITNESS: I have one.

9 THE COURT: I was so thankful that no book had been
10 distributed.

11 Q. Now, you mentioned -- I'm sorry, please review that
12 exhibit, from beginning to end.

13 MR. SCHILLER: It is a four-page e-mail, Your Honor.

14 (Pause)

15 Q. And, Mr. Lowitt (sic), I believe your testimony earlier
16 today was that when you came to work on Monday the 15th you
17 were advised at some point that morning of a deal -- possible
18 deal with Barclays, and you and your team had to get ready. Do
19 you recall that?

20 A. Yes, I do.

21 Q. And you were getting ready, as I recall your testimony,
22 because your team was assembling and a Barclays team was
23 assembling to come over for negotiations, correct?

24 A. Yeah. I think throughout the course of the morning into
25 the afternoon a team was assembling.

1 Q. And were lawyers from a variety of law firms representing
2 both Lehman and Barclays present?

3 A. There were many people present that day and that night
4 that were -- I was aware that there were law firms present. I
5 couldn't recognize individuals as being associated with --

6 Q. Do you know whether partners from Lazard were present, a
7 financial advisor?

8 A. I had an understanding that they were working on the
9 transaction. I don't think I ever met any as part of the
10 entire transaction.

11 Q. Right. Well, I showed you that e-mail from Mr. Reilly,
12 and this is another e-mail in which Mr. Reilly is involved.
13 And if I take you to page 402 of this e-mail, which is directed
14 from Mr. Reilly to you and Daniel Flores -- you see that?

15 A. Yes, I do.

16 Q. Now, incidentally, you said you were going to be providing
17 information to Barclays and to Lehman in connection with the
18 deal, correct?

19 A. I said I was part of a team that was doing that, yes.

20 Q. And did your team also provide information to the lawyers
21 and the financial advisors?

22 A. Yes. Yes.

23 Q. And did you do that specifically?

24 A. On occasion I did; on other occasions, other members of
25 the team did.

1 Q. On other occasions, did Daniel Flores do that?

2 A. I'm not aware. I'm not aware. I can see by reading the
3 e-mail here that he sent this e-mail on to individuals at
4 Lazard.

5 Q. Let me direct your attention to this e-mail to you and to
6 him. "The first question is very difficult," Reilly writes.
7 "My understanding of the deal is that they will purchase our
8 assets that remain in LBI on the closing date, which will not
9 be the same as the assets on the 12th." Does that refer to
10 Friday, September 12th?

11 A. I believe that refers to Friday the 12th, yeah.

12 Q. "The purchases will be at a fixed discount on the assets
13 that remain, to reflect the bulk size of the purchase." Do you
14 see that?

15 A. Yes, I do.

16 Q. Did you have an understanding when you received this
17 e-mail as to what was meant by that by Mr. Reilly?

18 A. I don't recall receiving this e-mail, but I don't think at
19 any point did I understand that there'd be a fixed discount.

20 Q. And if you turn the page, you see that Mr. Flores has sent
21 this e-mail to Mr. Bruhmuller and that Mr. Bruhmuller writes --
22 and he's from Lazard, do you see that?

23 A. Yes, I do.

24 Q. So whatever this bulk discount meant, whatever this fixed
25 discount on the assets meant, it was sent by Mr. Flores, upon

1 your and his receipt, to the financial advisors of Lehman --

2 Lazard, correct?

3 MR. GAFFEY: Your Honor, objection.

4 A. Based on this e-mail --

5 THE COURT: One --

6 MR. GAFFEY: Objection, Your Honor.

7 THE COURT: One second, Mr. Kelly.

8 MR. GAFFEY: The e-mail from where Mr. Schiller's
9 reading doesn't indicate Mr. Kelly's involved at all anymore.
10 Foundation objection. I'm not sure he has personal knowledge
11 as to what got sent to Lazard and what they did with it.

12 THE COURT: That's a fair objection and I sustain it.
13 So to the extent that this is an attempt to get through this
14 witness what happened to an e-mail that he was first receiving
15 but may not have had anything to do with forwarding, the
16 objection is sustained. If you can establish that he
17 participated in forwarding it to Mr. Bruhmuller, that's a
18 different story.

19 MR. SCHILLER: All right.

20 Q. Let me ask you a question from the next page, 9401. Mr.
21 Bruhmuller writes to Mr. Flores with respect to diligent (sic)
22 items, "We are trying to get a sense of how the marks have
23 evolved since Friday." You see that?

24 A. Yes, I do.

25 Q. "I think the first priority would be to see the inventory

1 of what's being sold, how the marks have evolved, and info on
2 the buyer discount." You see that?

3 A. Yes, I do.

4 Q. Were you involved in any subsequent discussion with Mr.
5 Bruhmuller about any of these issues he was trying to get a
6 sense of?

7 A. No, I was not.

8 (Pause)

9 Q. Let me ask you also to turn to tab 3 in the book that we
10 presented.

11 (Pause)

12 MR. SCHILLER: And I reference, for the record,
13 Exhibit 207, Your Honor.

14 Q. And this is an e-mail from you, Mr. Martin (sic), on
15 September 17th, to Mr. Krasnow of Weil Gotshal, correct?

16 A. Yes, I can see that.

17 Q. And does this provide Weil Gotshal with information
18 showing that transaction adjustments were being made on the
19 balance sheet in estimating the potential exposure for cure and
20 compensation liabilities?

21 A. Yes, this attachment is in the format that I described
22 earlier where it's an attempt to reflect on a prospective basis
23 at that point in time what the impact of the sale transaction
24 would be to the remaining balance sheet of Lehman.

25 Q. Again, would you explain to Judge Peck what the purpose

1 was of creating these types of balance sheets?

2 A. I think there was a need to understand, for several
3 reasons, what the impact of the transaction would be, the sale
4 transaction. One of the purposes, and one of the other tasks
5 that I was working on that week, was trying to identify what
6 filings would be necessary with the SEC as part of the
7 transaction. And so I think, related to that effort, we had
8 commenced a process to estimate the impact of the transaction
9 on the books of Lehman.

10 Q. How reliable is the information before His Honor in terms
11 of its point in time?

12 A. I think I could say that virtually every number on the
13 page here, with the exception of the 8/31 column, which is off
14 the ledger and balances, is an estimate of one form of another.
15 There were just so many issues in getting information, both in
16 terms of trying to establish what we thought we had on that
17 date and what it was worth, and liabilities that we had and
18 what they were worth.

19 Q. Were these figures -- I'm sorry. I want you to finish
20 your answer.

21 A. And then I think there was uncertainty and a lag in
22 reflecting changes to the terms of the transaction on the
23 spreadsheet.

24 Q. Were the figures changing constantly that week that
25 contributed to these associated liabilities?

1 A. Yes, I think that different categories of liabilities
2 changed throughout the week, as the assets changed as well.

3 Q. How was this information prepared?

4 A. My recollection is that this was under the ownership of
5 someone that reported to me, Kristie Wong, and she was with a
6 large group of people and, through e-mail and conversations,
7 including with myself, trying to capture both what we thought
8 we had as a firm at that point in time as well as what she
9 thought the terms of the transaction were.

10 Q. Why did you share this information with Weil Gotshal?

11 A. I think this was an evolving attempt to reflect our best
12 estimate at different points in time of what the impact of the
13 transaction would be to Lehman.

14 Q. And this effort and this communication to the lawyers, is
15 that part of the process that began on Monday and continued
16 through the week?

17 A. There were lawyers -- well, I believe there were lawyers
18 in the Monday night -- sorry, Tuesday morning conversation that
19 I referenced earlier, where we were talking about real estate
20 negotiations. There were lawyers -- we were all on the same
21 floor at 745 7th Avenue, the thirty-second floor. There were -
22 - and we spent several days there. There were lots of people
23 in different capacities there at the same time.

24 So I have difficulty saying, you know, a particular person
25 or a law firm or advisor was present at any one particular

1 point in time --

2 Q. Was it an open process?

3 A. It was open and there were also -- all of the conference
4 rooms were being used and people were walking in and out all
5 the time. I think that there was -- one part of the
6 negotiations that I do recall vividly is there was a Lehman
7 trader by the name of Eric Felder, and his counterpart at
8 Barclays Stephen King, they were negotiating on a sofa right to
9 the side of the reception desk, presumably because there was no
10 where else that they could go. And they were, sort of,
11 debating back and forth among themselves.

12 There were different meetings like that occurring around
13 the floor, and there were -- there was involvement by, you
14 know, different sets of advisors around those meetings.

15 Q. And were -- was information, like this information that
16 you sent to Weil Gotshal, also shared with Lazard, as far as
17 you know?

18 A. I don't know.

19 Q. Let me ask you to turn to tab 4, Exhibit 209, an e-mail at
20 the beginning from Kristie Wong, copying you; it's to Daniel
21 Flores. And you see at the top of the page it says "From
22 Daniel Flores to Barry Ridings".

23 Would you advise the Court whether the balance sheet at
24 9-2 of this exhibit is information that was also showing a
25 transaction adjustment to the balance sheet and estimating the

1 potential exposure for cure and comp?

2 A. Yeah, this -- it looks to be in a slightly different
3 format with the -- all the sales marked on the page. But it
4 looks to be a similar version to one of the other versions of
5 the spreadsheet that we looked at earlier.

6 Q. And this is dated on the 19th, is it not -- I'm sorry, on
7 the 18th, in terms of the e-mail from Ms. Wong?

8 A. The e-mail is as of the -- is sent at 6 p.m. on the 18th,
9 that's right.

10 Q. Can I ask you to turn to tab 5, please, another e-mail
11 concerning transaction adjustments to the balance sheet?

12 A. Yes.

13 MR. SCHILLER: This is Exhibit 212, for the record,
14 Your Honor.

15 Q. And this is an e-mail from Ms. Wong to Mr. Coles of
16 Alvarez & Marsal, correct? And you're copied on it. Do you
17 see that? September 18th?

18 A. Yes, I do.

19 Q. And would you turn to the last page where the balance
20 sheet appears? And do you see under Payables it says "Bonus
21 payable and cure and comp"?

22 A. Yes, I do.

23 Q. And a transaction adjustment, do you see that?

24 A. Yes, I do.

25 Q. Two billion for comp and 1.6 for cure?

1 A. Yes, I do.

2 Q. Does this e-mail reflect that the information showing
3 transaction adjustments on its balance sheet, in estimating the
4 potential exposures for comp and cure, were shared with Alvarez
5 & Marsal by your team?

6 A. Yes, it does.

7 MR. SCHILLER: May we put Movant's Exhibit 14 up on
8 the screen, please?

9 Q. Now, a question came up at the beginning of your
10 deposition as to employment prospects for you the week of
11 September 15th through the 22nd, 2008. Do you recall that?

12 A. Yes, I do.

13 Q. And you and the Court were provided with BCI Exhibit 362,
14 Your Honor, which was a handout.

15 THE COURT: I have that, but I'm confused by your
16 question. You said about -- you were asking about a question
17 at the beginning of this witness' deposition. Are you
18 referencing his deposition?

19 MR. SCHILLER: I'm sorry, I mean beginning of his
20 examination here, Your Honor --

21 THE COURT: All right.

22 MR. SCHILLER: -- concerning employment prospects.

23 Q. And if I can address your attention to paragraph 8 of your
24 declaration.

25 A. Sorry, I don't have that, I don't think, here.

1 Q. It's a loose exhibit.

2 A. (Pause). I'm sorry, I think I've misplaced it.

3 THE COURT: Here. You can take mine.

4 MR. SCHILLER: Thank you, Judge.

5 Q. Did you receive an offer of employment by Alvarez & Marsal
6 during the week of September 15th, 2008?

7 A. Yes. I had conversations with Alvarez & Marsal about a
8 variety of topics, starting on Tuesday the 16th. And I recall
9 several meetings with the Alvarez folks that week; the initial
10 conversations were focused on Lehman and how Lehman was
11 structured, both from a business and a legal entity
12 perspective. And after several meetings, I recall that Alvarez
13 suggested that they'd like me to either stay with Lehman or
14 join the team. And one option that they talked about was that
15 they needed someone as the CFO of Lehman on an ongoing basis.
16 And so in my mind that was an option or an opportunity that was
17 available to me.

18 Q. And following that opportunity to consider the job of CFO
19 for Lehman under the Alvarez & Marsal administration, did you
20 work with Alvarez & Marsal on this transaction through and
21 after closing?

22 A. Yes, I did. The work that I did with Alvarez continued
23 until after October 10, after I became a Barclays employee and
24 signed the contract. I was still working with Alvarez. The
25 effort diminished over time as a team was assembled to focus on

1 Lehman-related matters. But certainly through the weeks
2 leading up until that point in time, I did.

3 MR. SCHILLER: Let me turn to the subject of cure,
4 Your Honor, and this will conclude examination. I appreciate
5 the Court's patience and of everybody in the courtroom, but
6 Your Honor wanted to finish tonight and I'm doing my best --

7 THE COURT: That's fine.

8 MR. SCHILLER: -- to get that done.

9 Q. When did you first hear that Lehman would need to estimate
10 potential cure exposure of Barclays as a part of this
11 transaction?

12 A. I recall it was Monday. I recall it was Monday the 15th.
13 I recall it was late at nighttime. And I recall that that
14 conversation -- the initial conversation occurred with Mark
15 Shapiro from Lehman.

16 Q. And what was your understanding of what he explained to
17 you and what needed to be done?

18 A. Well, the notion of cure was foreign; I had never heard of
19 it, and it took a while to conceptualize what it meant. It
20 became, as we talked about it -- and I do recall it was a
21 series of conversations and one of them involved a large group
22 of people, because I don't think anyone actually understood
23 what the concept was -- well, from where I sat, of what cure
24 was, except for Mark.

25 The -- I think the -- what I learned was that it was a

1 broad concept. It would -- in substance, it would apply to any
2 liabilities that Barclays would assume to continue to operate
3 the businesses that it was acquiring.

4 Q. Did you have any understanding whether the estimate of
5 cure would be binding on Barclays through the contemplated sale
6 agreement?

7 A. No. I understood at some point -- it may not have been
8 the Monday night, but I understood that there was a period of
9 time during which Barclays had the right to accept or reject
10 contracts. I also mentioned earlier that I had an
11 understanding on the Monday night/Tuesday morning, the
12 15th/16th, that there was an adjustment feature, which I
13 thought was to adjust any purchase consideration back to the
14 liabilities that were actually issued.

15 Q. As the financial comptroller, did you have any
16 understanding that an estimate for cure could be readily
17 generated from Lehman's general ledger?

18 A. The concept of cure was certainly not anything that was
19 reflected as an account or a set of accounts on the ledger. I
20 think part of the difficulty I had just trying to understand
21 what it meant was that it was potentially quite broad. It was
22 very difficult to define what types of contracts would be
23 covered by it and what would not. And then ultimately it was
24 Barclays' decision to accept them or not.

25 So I had an understanding that at its most fundamental it

1 included trade, liabilities and accounts payable, and the like,
2 that were reflected on the ledger, and reflected either
3 invoices that had been received or accruals that had been made
4 for costs that were known about.

5 But there was uncertainty around the number and the type
6 of contracts. There was uncertainty around what other
7 liabilities might need to be assumed beyond, sort of, obvious
8 trade creditor type liabilities. There was uncertainty around
9 how to identify all of the contracts, because Lehman had a
10 system for allocating expenses among different legal entities.

11 And so while LBI reflected some of the accrual and some of
12 the liabilities, other entities in the group would have been
13 holding a liability or had a liability, whether recognized or
14 not, that related to the businesses that were being acquired.

15 Q. Did anyone tell you or your team which contracts during
16 the week of September 15th that Barclays intended or expected
17 to assume?

18 A. No. I don't recall being told or seeing a list. I was
19 aware that there was -- as I mentioned, there was an effort to
20 identify contracts. I don't believe I ever saw that, actually.

21 Q. From September 15th through September 22nd, did you have
22 any conversations with anyone at Barclays about what they
23 expected or intended to spend on cure after they took over the
24 business?

25 A. No, I did not.

1 Q. Do you believe that the Lehman estimates of cure or comp
2 were inflated intentionally in any way?

3 A. No, absolutely not.

4 Q. Thank you, Mr. Kelly.

5 MR. SCHILLER: Thank you, Your Honor.

6 THE COURT: Thank you.

7 Is there any redirect?

8 MR. GAFFEY: One question, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. GAFFEY:

11 Q. When you spoke to Ms. Fife and gave her the number, you
12 didn't tell her how you calculated it, right? You just told
13 her it was 1.5 billion dollars?

14 A. No. My recollection is that the conversation was 1.0
15 billion, not 1.5. I don't recognize 1.5 billion as a number.

16 Q. That's your memory?

17 A. That's my memory.

18 Q. Did you write her a memo?

19 A. No, I didn't write her a memo.

20 Q. Did you give her a document that said 1.0?

21 A. I don't recall giving her directly anything. There were
22 versions of the balance sheet that went to Weil. I believe
23 that one of them had the 1.0 billion --

24 Q. So you didn't --

25 A. -- on its --

1 Q. -- speak to Ms. Fife?

2 A. I did speak to Ms. Fife. She called me to ask why the
3 estimate had moved down, and my recollection of "down to" was
4 1.0 billion.

5 Q. Okay, and that's your recollection is the 1.0 billion?

6 There's no memo, there's no e-mail, there's no document that
7 reflects it?

8 A. No. I clearly remember receiving a call. I remember it
9 being of some urgency. My recollection is it was 1.0 billion,
10 and my recollection is that I explained why it had moved down.

11 MR. GAFFEY: Nothing further, Your Honor.

12 MR. SCHILLER: Just one question, Judge.

13 RECROSS-EXAMINATION

14 BY MR. SCHILLER:

15 Q. Why, of all the things that were going on that week on
16 Friday, do you remember this call? Was there an interaction in
17 this call that causes you to -- has caused you to remember it
18 through to today?

19 A. I -- yeah, I hadn't spoken with Lori Fife before that
20 point that I can recall. I'd heard her name. I think the
21 thing that makes me recall it is that the -- it was quite
22 evident to me that the information was important and that she
23 needed to know it and have it. And I think she was surprised
24 that it had moved down. And she was, as I mentioned before,
25 either leaving for or on her way to court.

1 Q. Thank you.

2 MR. SCHILLER: Thank you, Your Honor.

3 MR. GAFFEY: No further questions.

4 THE COURT: Okay, Mr. Kelly, thank you, you're
5 excused, and I'm sure you'll be relieved to go back to work
6 tomorrow.

7 THE WITNESS: Thank you, Your Honor.

8 THE COURT: Before we conclude, yesterday there was
9 the debate that I asked to table to another day, having to do
10 with the scheduling of Mr. Varley for Friday, May 7th. I don't
11 know if the parties have made any progress with regard to
12 scheduling, and it's also not clear to me whether or not
13 because we're falling a little bit behind this is a problem
14 that may take care of itself. But rather than burden the
15 record or the parties at this late hour, I'm going to suggest
16 that we have a conference on scheduling sometime before the end
17 of the week and that, to the extent it's possible for the
18 parties to work this out consensually, that would be obviously
19 ideal. To the extent it's not, we'll do it in a chambers
20 conference.

21 MR. SCHILLER: Thank you, Your Honor.

22 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

23 THE COURT: Okay. We're adjourned.

24 (Whereupon these proceedings were concluded at 6:47 p.m.)

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I N D E X

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T E S T I M O N Y

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| | WITNESS | EXAM BY | PAGE | LINE |
|----|---------------|--------------|------|------|
| 6 | Harvey Miller | Mr. Gaffey | 10 | 20 |
| 7 | Harvey Miller | Mr. Maguire | 81 | 5 |
| 8 | Harvey Miller | Mr. Schiller | 92 | 17 |
| 9 | Harvey Miller | Mr. Gaffey | 126 | 2 |
| 10 | Harvey Miller | Mr. Werder | 127 | 17 |
| 11 | Martin Kelly | Mr. Gaffey | 130 | 9 |
| 12 | Martin Kelly | Mr. Maguire | 244 | 8 |
| 13 | Martin Kelly | Mr. Schiller | 264 | 6 |
| 14 | Martin Kelly | Mr. Gaffey | 287 | 16 |
| 15 | Martin Kelly | Mr. Schiller | 287 | 20 |

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17

E X H I B I T S

18

| | NO. | DESCRIPTION | ID. | EVID. |
|----|--------------|---|-----|-------|
| 19 | Movants' 8 | E-mail to Mr. Lowitt describing terms | | 153 |
| 20 | Movants' 254 | Versions of balance sheets | | 218 |
| 21 | Movants' 188 | E-mail From Paolo Tonucci to Ian Lowitt, Michael Gelband and Martin Kelly | | 220 |
| 22 | | | | |
| 23 | | | | |
| 24 | | | | |
| 25 | | | | |

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2 I N D E X, cont'd

3

4 E X H I B I T S

5 NO. DESCRIPTION ID. EVID.

6 Movants' 21 E-mail from Gerard Reilly to

229

7 Mr. Kelly dated 9/17/08

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4 I, Lisa Bar-Leib, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

6

7

8 LISA BAR-LEIB

9 AAERT Certified Electronic Transcriber (CET**D-486)

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16 Date: April 30, 2010

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